Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

Petitioner,

v.

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, and IVA ROGERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether alleged reservation land is Indian Country pursuant to 18 U.S.C. § 1151 and this Court's decision in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998) ("*Venetie*") where the land was neither set aside by the federal government nor superintended by the federal government?

2. Whether alleged reservation land was set aside by the federal government for purposes of Indian Country analysis under 18 U.S.C. § 1151 and *Venetie* where the alleged reservation was established by the State of New York in the 1788 Treaty of Fort Schuyler, and not by any federal treaty, action or enactment?

3. Whether the 1838 Treaty of Buffalo Creek, which required the New York Oneidas to permanently abandon their lands in New York, resulted in the disestablishment of the Oneida's alleged New York reservation?

4. Whether alleged reservation land may (i) remain Indian Country or (ii) be subject to the protections of the Non-Intercourse Act, 25 U.S.C. § 177, if the tribe claiming reservation status and Non-Intercourse Act protection ceases to exist?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Second Circuit were petitioner City of Sherrill, New York and respondents Oneida Indian Nation of New York, Ray Halbritter, Keller George, Chuck Fougnier, Marilyn John, Clint Hill, Dale Rood, Dick Lynch, Ken Phillips, Beulah Green, Brian Patterson and Iva Rodgers. Respondent Ruth Burr was a party in the district court and Second Circuit, but a suggestion of death of Ruth Burr was filed in the Second Circuit on May 10, 2002. Madison County, Oneida County and the State of New York appeared as *amici curiae* in the district court and Second Circuit.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 337 F.3d 139 and appears in the Appendix at A1-A60. The order denying the Petition for Rehearing or Rehearing *en banc* is unreported and appears in the Appendix at A134-A135. The memorandum decision and order of the district court is published at 145 F. Supp.2d 226 and appears in the Appendix at A61-A133.

JURISDICTION

The judgment of the Court of Appeals was issued on July 21, 2003. The Petition for Rehearing or Rehearing *en banc* was denied on September 15, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pursuant to Supreme Court Rules 14(f) and 14(i)(v), the following treaty and statutory provisions are involved in the case and appear in the Appendix: The 1788 Treaty of Fort Schuyler, September 22, 1788; the 1794 Treaty of Canandaigua, November 11, 1794, 7 Stat. 44; the 1838 Treaty of Buffalo Creek, January 15, 1838, 7 Stat. 550; 18 U.S.C § 1151; 25 U.S.C § 177; 25 U.S.C. § 233; and 25 U.S.C. § 465.

STATEMENT OF THE CASE

There are special and important reasons warranting this Court's exercise of its discretion to issue a writ of *certiorari* to review the decision of the Second Circuit. The Indian land claim issues arising in this Petition are of critical importance to the State of New York and municipalities such as the City of Sherrill. The Oneida Indian Nation alone lays claim to 300,000 acres in central New York. Similar claims

exist for other Indian tribes in New York and elsewhere. If the decision of the Second Circuit is not reviewed and reversed, the tax base and viability of cities such as the City of Sherrill – across New York and elsewhere – will be imperiled.

Moreover, the Second Circuit's decision is: (i) in direct conflict with precedents of this Court (such as *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998); *New York Indians v. United States*, 170 U.S. 1 (1898); and *United States v. New York Indians*, 173 U.S. 464 (1899)); (ii) ignores the express provisions of two Indian treaties, the 1788 Treaty of Fort Schuyler and the 1838 Treaty of Buffalo Creek, 7 Stat. 550; and (iii) grossly expands the reach of the Indian Trade and Non-Intercourse Act (the "Non-Intercourse Act"), currently codified at 25 U.S.C. § 177, in direct conflict with decisions of other United States Courts of Appeals.

In the 1788 Treaty of Fort Schuyler, prior to the effective date of the United States Constitution, the New York Oneidas ceded all of their territory to the State of New York. That cession terminated all aboriginal title. The State of New York then set aside approximately 300,000 acres for the New York Oneidas' future use. In 1794, the federal government, in the Treaty of Canandaigua, 7 Stat. 44, acknowledged the reservation set aside in the Treaty of Fort Schuyler, but did not create a reservation for the Oneidas.

The New York Oneidas sold much of the 300,000 acres set aside by the State of New York, including a sale in 1805 to an individual Oneida Indian who then conveyed the land at issue in this Petition. In the centuries that followed, the conveyed land remained outside the possession of the Oneidas, held by private landowners.

In 1997, using proceeds from its casino in central

New York State, the Oneida Indian Nation of New York ("OIN") purchased several parcels of land on the open market, including those in the City of Sherrill upon which the disputed properties are situated (the "Properties"). Wrongly claiming that it had come back into possession of a portion of its ancestral Indian reservation established in 1794 by the Treaty of Canandaigua, the OIN refused to pay property taxes or collect sales taxes in connection with the Properties. The litigation giving rise to this Petition ensued.

The governing treaties and this Court's controlling case law compel the conclusion that the Properties are not Indian Country pursuant to 18 U.S.C. § 1151. First, the land at issue was neither set aside nor superintended by the federal government. Rather, the land was set aside for the use of the New York Oneidas by the State of New York in the 1788 Treaty of Fort Schuyler. For two centuries, State and local governments have provided all services with respect to the land at issue. As a result, under *Venetie*, the land at issue is not Indian Country pursuant to 18 U.S.C. § 1151, and may be taxed by the City of Sherrill.

Second, the 1838 Treaty of Buffalo Creek, 7 Stat. 550, required the New York Oneidas to abandon all lands in the State of New York and remove to Kansas, thus terminating any remaining New York Oneida reservation. The New York Oneidas sued to recover the value of the Kansas land it received in exchange for abandoning New York, and shared in the nearly $2 million recovery. *New York Indians v. United States*, 170 U.S. 1 (1898); *United States v. New York Indians*, 173 U.S. 464 (1899); *New York Indians v. United States*, 40 Ct. Cl. 448, 457-61 (1905); *In re Appeal of New York Indians*, 41 Ct. Cl. 462, 468-72 (1906). Thus, the New York Oneidas sought and received the benefit of the Kansas reservation established in the 1838 Treaty of Buffalo Creek in exchange for any New York reservation.

Third, there was substantial evidence below that the New York Oneidas ceased to exist as a tribe for decades in the late nineteenth and early twentieth centuries. If tribal status ceased, Indian Country status and the protections of the Non-Intercourse Act, 25 U.S.C. § 177, ceased, and the only way that the New York Oneidas could recover reservation status was by petitioning under § 465 of the Indian Reorganization Act, 25 U.S.C. § 465. *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 (1998). Thus, at the very least, summary judgment for the Oneida Indian Nation was improper.

The Parties

Petitioner City of Sherrill is a municipal corporation organized under the laws of the State of New York. It is New York's smallest city, occupying one and one-half square miles, with a population of approximately 3,000. Its total annual budget is approximately $2.4 million.

Respondent Oneida Indian Nation of New York ("Oneida Indian Nation") is presently a federally recognized Indian tribe governed by a Nation Representative and a Tribal Council. Respondent Ray Halbritter is the Nation Representative, chief executive officer of the Oneida Nation enterprises, and one of the members of the Council. The other Respondents are members of the Council.

The Relevant History of the Oneida Indians

Prior to and during the Revolutionary War, the colonists respected the Oneidas' right to possession of their aboriginal lands, which totaled approximately six million acres in central New York. *Oneida Indian Nation v. City of Sherrill*, 145 F. Supp.2d 226, 233-34 (N.D.N.Y. 2001). In 1788, in the Treaty of Fort Schuyler with the State of New York, the Oneidas sold all of their land to the State of New

York, which at the same time created a 300,000-acre reservation for use by the Oneidas. *Id.* That treaty and sale terminated aboriginal title to the land.

Two years later, in 1790, Congress passed the Non-Intercourse Act, currently found at 25 U.S.C. § 177, which required the federal government to approve all sales or transfers of land from any Indian nation or Indian tribe. *Id.* The Non-Intercourse Act, however, did not limit the right of the States to engage in transactions where aboriginal title had already been extinguished. *County of Oneida, New York v. Oneida Indian Nation of New York*, 470 U.S. 226, 232 (1985). As they had prior to the passage of the Non-Intercourse Act, the Oneidas continued to sell large portions of the land that New York State had set aside for their use.

In the 1794 Treaty of Canandaigua, 7 Stat. 44, the federal government in Article II merely "acknowledge[d]" what remained of an Oneida reservation in New York, and agreed that "the . . . reservation[] shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." That is to be contrasted with the treatment of the Senecas, whose reservation was established by Article III of the treaty.

Beginning one year later, in 1795, the Oneidas sold most of what remained of their 300,000-acre reservation created by the State of New York. *Oneida Indian Nation*, 145 F. Supp.2d at 234. Since 1795, title to portions of this land has passed through voluntary, free-market transactions. *Id.* The transactions that conveyed the Properties at issue in this case occurred in 1805, when the Properties were conveyed by a group of Oneida Indians to Cornelius Dockstader, an Oneida Indian. In 1807, Dockstader conveyed them to Peter Smith, a non-Indian. *Id.* at 243.

Beginning in the early nineteenth century, the federal

government's policy toward the Indians changed from respect for the Indians' possession of their ancestral lands to removal of the eastern Indians to lands in the western United States. Between 1820 and 1822, and in keeping with the federal government's new policy, some New York Indians, including some Oneidas, relocated to land the federal government purchased for them in the state of Wisconsin. *Id.* at 234-35. Other Oneidas relocated to Ontario, Canada. *Id.* at 235. Thus, the Oneidas split into three distinct groups: the New York Oneidas, the Wisconsin Oneidas and the Canadian Oneidas (also known as the Thames Oneidas). *Id.* The Oneida Indian Nation claims to be a successor to the New York Oneidas.

The federal government codified its removal policy in the Indian Removal Act, passed by Congress in 1830, which authorized the federal government to give land west of the Mississippi River to Indians in exchange for their eastern land. *Id.* "The core purpose of the federal removal policy was to mak[e] a vast area available for white settlement while reducing the conflict of sovereign authority caused by the presence of independent Indian governments within state boundaries." Felix S. Cohen, *Handbook of Federal Indian Law*, 79 (1982 ed.).

One result of the federal policy of removal was the 1838 Treaty of Buffalo Creek, 7 Stat. 550, an obligatory removal treaty in which several Indian tribes, including the New York Oneidas, agreed to remove to Kansas. In Article 2 of the treaty, the United States designated a 1,824,000-acre reservation in what is now the State of Kansas "as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States . . ." In Article 13, the New York Oneidas

agreed to remove to their new home in Kansas.[1]

Although most of the remaining New York Oneidas did not move to Kansas to live on the reservation designated for their benefit in the Treaty of Buffalo Creek, they and other New York Indian tribes sued the United States for the value of the Kansas lands after the federal government sold the Kansas lands to homesteaders. *New York Indians v. United States*, 170 U.S. 1 (1898). Their lawsuit was successful, and the New York, Wisconsin and Thames Oneidas shared in the nearly $2 million recovery. *Id.*; *United States v. New York Indians*, 173 U.S. 464 (1899); *New York Indians v. United States*, 40 Ct. Cl. 448, 457-61 (1905); *In re Appeal of New York Indians*, 41 Ct. Cl. 462, 468-72 (1906). Thus, the Oneidas sought and received the benefit of the Kansas reservation established in exchange for their New York reservation in the 1838 Treaty of Buffalo Creek.

There is substantial evidence that, following the 1838 Treaty of Buffalo Creek, the New York Oneidas ceased to exist as a tribe for nearly a century. For example, in 1877 a district court noted that "[The Oneida] tribal government has ceased as to those who remained in [New York] state . . . [The designated chief's] sole authority consists in representing them in the receipt of an annuity.... They do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they are identified with the rest of the population." *United States v. Elm*, 25 F. Cas. 1006 (N.D.N.Y. 1877).

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1 At the time of the 1838 Treaty of Buffalo Creek, there were 620 Oneidas in New York and 600 in Wisconsin. Most of the remaining Oneidas left New York in the next few years. *The Oneida Indian Experience: Two Perspectives*, 61 (J. Campisi and L. Hauptman eds. 1988).

Similarly in 1891, the federal government explained that "The Oneida Indians have no reservation.... [The few Oneidas that remain] are capable and thrifty farmers, and travelers passing through the county are unable to distinguish in point of cultivation the Indian farms from those of the whites. The Oneida have no tribal relations, and are without chiefs or other officers." *1891 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior*. That same observation was oft repeated over the following decades. *See 1893 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior*; *1900 Annual Reports of the Department of the Interior*; *1901 Annual Reports of the Department of the Interior*; *1906 Annual Reports of the Department of the Interior*. That point is also made in the 1892 Census map of New York, which depicts no Oneida reservation.

That situation persisted into the mid-twentieth century. For example, the record below established that in 1925, an Assistant Commissioner of Indian Affairs indicated in a letter that, as a tribe, the Oneidas are no longer known in the State of New York. Further, in the 1942 *Handbook of Federal Indian Law*, Cohen explains that the Oneidas are known no more in the State of New York. Felix S. Cohen, *Handbook of Federal Indian Law*, 416-17 (1942 ed.). Moreover, into the 1950's, in a Committee Report from the Senate Committee on Interior and Insular Affairs, the Committee acknowledged that the "Oneida and Cayuga Indians have no reservations." S. Rep. No. 1836, at 5 (1950).

The Action Below

In 1997 and 1998, the Oneida Indian Nation used the proceeds from its Turning Stone casino in Verona, New York to purchase several businesses and properties in Madison and

Oneida Counties, New York in open-market transactions with private parties. Included in these purchases were the Properties in Sherrill upon which the Oneida Indian Nation operates a gas station having an attached convenience store and a textile manufacturing and distribution facility.

Contending that the Properties were located within its historical reservation, the Oneida Indian Nation refused to pay property taxes assessed by Sherrill on the land and structures, or to collect sales tax on sales of merchandise sold at their businesses. Sherrill sent the Oneida Indian Nation notices of tax delinquency for the Properties and thereafter conducted a tax sale, purchased the Properties and initiated eviction proceedings in New York State Supreme Court (the "Eviction Case").

The Oneida Indian Nation then sued Sherrill in the United States District Court for the Northern District of New York, seeking a declaratory judgment that the Properties were situated on land that was part of its historic reservation, established by the 1794 Treaty of Canandaigua and, therefore, exempt from state and local taxation (the "Lead Case"). The Oneida Indian Nation also removed the Eviction Case to federal court, and contended that Sherrill's claims were barred by sovereign immunity. In response, Sherrill commenced an action against the individual members of the Oneida Tribal Council (the "Members Case"). The Eviction, Lead and Members Cases were subsequently consolidated and adjudicated in district court.

The United States District Court for the Northern District of New York had subject matter jurisdiction to adjudicate the consolidated cases. In the Lead Case, Oneida Indian Nation asserted numerous bases for federal jurisdiction, including 28 U.S.C. §§ 1361-62; 42 U.S.C. § 1983;, the Indian Commerce Clause (Art. I, § 8) and the Due Process Clause (Amend. XIV) of the United States

Constitution; 25 U.S.C. § 177; the 1794 Treaty of Canandaigua; and federal common law. The Eviction Case and the Members Case involve similar facts as the Lead Case. The Eviction Case was filed by Sherrill in local court and removed by Oneida Indian Nation to district court based upon many of the same assertions of federal jurisdiction as in the Lead Case. Subject matter jurisdiction in the Members Case was predicated on the same bases as the Lead Case.

In a June 4, 2001 memorandum-decision and order, the district court: (1) denied Sherrill's motion in the Lead Case for summary judgment or, alternatively, a preliminary injunction enjoining Oneida Indian Nation from purchasing additional properties in Sherrill; (2) granted the Oneida Indian Nation's cross motion for summary judgment in the Lead Case and granted Oneida Indian Nation's motion for summary judgment in the Eviction Case; (3) granted summary judgment dismissing Sherrill's counterclaims against the Oneida Indian Nation in the Lead Case; (4) granted defendants' motion to dismiss the Members Case; and (5) denied Sherrill's motion for leave to amend its answer in the Lead Case. *Oneida Indian Nation*, 145 F. Supp.2d at 266-67 (N.D.N.Y. 2001).[2]

The City of Sherrill appealed and, to the extent pertinent here, the Second Circuit affirmed (in a 2-1 decision), with Senior Circuit Judge Van Graafeiland dissenting. *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003). The Court of Appeals found that the Properties were Indian Country because the reservation had been established, not by New York State in the 1788 Treaty of Fort Schuyler, but rather by the federal government in the 1794 Treaty of Canandaigua, 7 Stat. 44. The Second Circuit

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2 That same day, the district court also entered three separate final judgments disposing of all parties' claims.

rejected any notion that the 1838 Treaty of Buffalo Creek, 7 Stat 550, required the New York Oneidas to abandon New York State. Finally, the Second Circuit held that tribal continuity is not required for a tribe to maintain reservation status and Non-Intercourse Act protection – that is, a reservation and Non-Intercourse Act protection continues even if a tribe ceases to exist. 337 F.3d at 155-56, 158-65, 165-68. The City of Sherrill petitioned for rehearing or rehearing *en banc*; that petition was denied on September 15, 2003.

The Status of Oneida Indian Nation's Properties Today

This case is one of many lawsuits the Oneida Indian Nation has filed in an attempt to undo the 1788 Treaty of Fort Schuyler, 1838 Treaty of Buffalo Creek and the land transactions its ancestors entered into with New York State beginning two hundred years ago. The decisions summarized below place the Oneida Indian Nation's dispute with Sherrill in context.

Oneida Indian Nation of New York State v. County of Oneida, New York, 414 U.S. 661 (1974) ("*Oneida I*") – In 1970, the Oneida Indian Nation and the Wisconsin and Thames Oneidas brought suit against Oneida and Madison Counties (the "Counties") in the Northern District of New York to recover the fair rental value of certain land possessed by the Counties for the period January 1, 1968 through December 31, 1969. *Id.* at 664-65. The Oneidas claimed that the land at issue was part of the 300,000 acres sold by the Oneidas to New York State in 1795, allegedly in violation of the Non-Intercourse Act. *Id.* This Court held that the Oneidas' complaint stated a controversy arising under the Constitution, laws, or treaties of the United States, and therefore that the district court erred in dismissing it for lack of federal question jurisdiction. *Id.* at 666.

County of Oneida, New York v. Oneida Indian Nation of New York, 470 U.S. 226 (1985) ("*Oneida II*") – This Court in *Oneida I* remanded the case to the district court for trial. On remand, after a trial in which the Counties presented no evidence, the district court held, *inter alia*, that the Counties were liable for wrongful possession of the lands conveyed to New York State in 1795 because that conveyance violated the Non-Intercourse Act. *Id.* at 232-33. The Court awarded damages for the fair rental value of the land for the two-year period specified in the complaint. *Id.* at 230. The district court's decision was appealed. This Court held that the Oneidas could maintain an action for violation of their possessory rights based on federal common law and that the action was not barred by the statute of limitations, abatement, ratification or nonjusticiability. *Id.* at 240-50. This Court declined to rule on whether laches barred the Oneidas' claim. *Id.* at 244-45.

Oneida Indian Nation of New York v. County of Oneida, 199 F.R.D. 61 (N.D.N.Y. 2000) ("*Oneida III*") - In 1974, the Oneida Indian Nation and the Wisconsin Oneidas commenced another action against the Counties, alleging that beginning in the 1790's, the State of New York illegally acquired approximately 250,000 acres of Oneida Indian land. *Id.* at 66. That case – commonly referred to as the "Land Claim Case" – remained inactive while the Oneidas pursued their so-called test case (which resulted in *Oneida I* and *Oneida II*). *Id.* In 1998, the Land Claim Case became active when the United States intervened, and the Oneidas moved to amend their complaint to: (1) add the Thames Oneidas as plaintiffs; (2) add the State of New York as a defendant; and (3) add approximately 20,000 private landowners, the New York State Thruway Authority, Niagara Mohawk Power Corporation and Oneida Valley National Bank (collectively, the "private landowners") as defendants. *Id.* at 67-68. The Oneidas sought to add private landowners as defendants to collect damages from them and/or eject them from their

homes. *Id.*

On September 25, 2000, the district court granted the Oneidas' motions to add the Thames Oneidas as a plaintiff and the State of New York as a defendant. The court, however, denied the Oneidas' motion to add the private landowners as defendants in the suit, holding that a claim to eject current landowners would be futile because the Oneidas were not entitled to possession of the land. *Id.* at 92-93.

REASONS FOR GRANTING THE WRIT

I. CONTRARY TO THE DECISION BELOW, UNDER THIS COURT'S DECISION IN *VENETIE* AND THE 1788 TREATY OF FORT SCHUYLER, THE PROPERTIES ARE NOT INDIAN COUNTRY BECAUSE THE LAND WAS SET ASIDE BY THE STATE OF NEW YORK AND SUPERINTENDED BY STATE AND LOCAL GOVERNMENTS

The Second Circuit's decision below must be reviewed and reversed because it ignores this Court's holding in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998), that for property to be Indian Country and exempt from taxation it (1) must have been set aside by the federal government for use of Indians as such; and (2) must be under the superintendence of the federal government. The Properties here were neither: they were set aside and superintended by the State of New York and local governments.

This Court has explained that "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.'" *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991).

Whatever the word "reservation" means in other contexts, reservation status for Indian Country purposes is a term of art.

The Properties the Oneida Indian Nation purchased in Sherrill are not Indian Country. Indian Country is limited to:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (emphasis added).

Although § 1151 has three prongs[3] – reservations, dependent Indian communities and allotments – this Court made clear in *Venetie*, 522 U.S. at 527, that the essential nature of Indian Country is the same under all three prongs of the statute: the land (1) must be set aside by the federal government for use of Indians as such and (2) must be under the superintendence of the federal government. In *Venetie*, this Court explained that, in enacting § 1151 in 1948, Congress codified two requirements that the Court had previously held necessary for a finding of Indian Country generally – (1) federal set-aside and (2) federal

[3] Only the "reservations" prong of § 1151 is at issue in this case. Moreover, the Oneida Indian Nation concedes that, if the Properties are not Indian Country, then the Properties are not exempt from taxation.

superintendence. *Venetie*, 522 U.S. at 527.

In the words of the this Court,

> [In our prior cases] . . . we relied upon a finding of both a federal set-aside and federal superintendence in concluding that the Indian lands in question constituted Indian country and that it was permissible for the Federal Government to exercise jurisdiction over them. Section 1151 does not purport to alter this definition of Indian country, but merely lists the three different categories of Indian country mentioned in our prior cases: Indian reservations, dependent Indian communities, and allotments.

Id. at 530 (citations omitted). Neither federal set aside nor superintendence is present here. As a result, this Court should grant the Petition and reverse the decision below.

A. The Properties Were Set Aside By The State of New York

The Second Circuit ignored the express language of the 1788 Treaty of Fort Schuyler in concluding that the Properties were set aside by the federal government. The initial paragraph of the 1788 Treaty of Fort Schuyler states, in its entirety, "The Oneidas do cede and grant all their lands to the people of the State of New York forever."[4] Of this grant, New York reserved a 300,000-acre tract for the Oneidas' "specified uses." Thus, it cannot be questioned that it was the State of New York, and not the federal

[4] Occurring prior to the effective date of the United States Constitution, this sale was totally lawful. *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145, 1148 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).

government, that set aside for use by the Oneidas the land upon which the Properties are situated.

The Second Circuit ignored the Treaty of Fort Schuyler and found that the Oneida reservation was set aside by the 1794 Treaty of Canandaigua. 337 F.3d at 155-56. That is incorrect (although that same observation appears as *dicta* in many cases where the issue was not directly litigated). Rather, the 1794 Treaty of Canandaigua merely – and expressly – "acknowledged" the land reserved by New York State for the Oneidas.

Thus, in the 1794 Treaty of Canandaigua with the Six Nations of the Iroquois,[5] Article II provides, in pertinent part, that

> "The United States acknowledges the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof . . ."

That is to be contrasted with Article III of the treaty, which expressly establishes a reservation for the Senecas.

Accordingly, the 1794 Treaty of Canandaigua was nothing more than a mere acknowledgment by the federal government of the Oneida reservation created by New York State through the 1788 Treaty of Fort Schuyler. Neither in the Treaty of Canandaigua nor elsewhere did the federal

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5 The Six Nations consisted of the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora nations.

government even purport to designate this land as Indian Country.

As in *Venetie*, the Oneidas own the Properties in Sherrill in fee simple and are free to use them for any purpose, including any non-Indian purpose. Additionally, the Oneida Indian Nation owns the Properties free from any and all federal government restrictions. The Properties simply are not located within "a reservation under the jurisdiction of the United States government." *Blunk v. Arizona Dep't of Transp.*, 177 F.3d 879, 883-84 (9th Cir. 1999) ("The [Navajo land in question] is not [Indian Country] because the land was purchased in fee by the Navajo Nation rather than set aside by the Federal Government"); *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir.), *cert. denied*, 510 U.S. 994 (1993) (United Keetoowah Band of Cherokee Indians' ("UKB") businesses were not located on land set aside by the federal government for purposes of 18 U.S.C. § 1151(b) because title was held by UKB in fee simple and "[n]o action ha[d] been taken by the federal government indicating that it set aside the land for use by the UKB").

At bottom, the 1794 Treaty of Canandaigua did not set aside an Oneida reservation. Rather, that land was set aside by the State of New York in the 1788 Treaty of Fort Schuyler. As a result, the land on which the Properties are situated was not set aside by the federal government for use by the Oneidas. Therefore, under this Court's decision in *Venetie*, the Properties are not Indian Country pursuant to 18 U.S.C. § 1151. This Court should grant the Petition to correct the Second Circuit's tortured reading of the 1788 Treaty of Fort Schuyler and its refusal to follow *Venetie*.

B. The Properties Were Never Under Federal Superintendence

Independent of the set aside requirement, the

Properties are not now and never were under federal superintendence, which is an independent reason why they are not Indian Country. *Venetie*, 522 U.S. at 533. The Second Circuit essentially rejected that aspect of *Venetie*, and held that there was no requirement of proof that "reservation" land is federally superintended to be Indian Country. The Petition should be granted to correct that error.

The level of federal superintendence over Indian land required for Indian Country status is that the federal government "actively controls the lands in question, effectively acting as a guardian for the Indians." *Id.* In other words, the land must be "under the jurisdiction and control of Congress for all governmental purposes, relating to the guardianship and protection of the Indians." *Id.*

Tested by that standard, the Properties are not federally superintended. The federal government never actively controlled the Properties. The federal government never exercised jurisdiction over the Properties, as guardian and protector of Oneida Indian Nation.[6] The Oneida Indian Nation purchased the Properties in fee simple and has since opened businesses on the acquired land. Services for the Properties are provided by Sherrill and not by the federal government. Moreover, the Properties are not part of the 32 acres of land in Madison County recognized by the Bureau of Indian Affairs as under the jurisdiction of the federal government. In such circumstances, the federal government does not superintend the Properties. *United States v. Roberts*,

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6 Indeed, the legislative history to 25 U.S.C. § 233, which conferred jurisdiction on the State of New York for civil actions between Indians (or to which Indians are parties) indicates that the federal Indian Bureau believed, at the time this act was passed, that the Indians of New York "are in no further need of governmental supervision or control." H.R. REP. NO. 81-2720, at 2 (1949).

185 F.3d 1125, 1130-31 (10th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000) (land was under federal superintendence only because the United States retained title to the property; the state considered the property to be beyond its taxing jurisdiction; the BIA Area Director approved the land acquisition; the government oversaw the property; and the BIA treated the property as trust land); *HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1253 (10th Cir. 2000) (land was under federal superintendence because the BIA treated the land in the same manner as lands within the tribe's formal reservation).

The Second Circuit's conclusion that the Properties are Indian Country simply because they are within the historical Oneida Indian reservation is incorrect. The court reached that conclusion by finding that the federal set aside and superintendence requirements are inapplicable where the land in question is a formal reservation. 337 F.3d at 155 ("While questions may arise as to whether nonreservation property owned by Indians is in Indian country, there are no such questions with regard to reservation land, which by its nature was set aside by Congress for Indian use under federal supervision."). That holding incorrectly (i) presumes the existence of federal set aside; (ii) ignores *Venetie*; (iii) eviscerates the requirements of proof of federal set aside and superintendence for all three prongs of 18 U.S.C. § 1151; and (iv) is based upon the incorrect finding that the federal government established the reservation for the Oneidas in New York State through the 1794 Treaty of Canandaigua. That distortion of this Court's precedents and governing treaties must not be permitted. This Court should grant the Petition and reverse the decision below.

II. THE 1838 TREATY OF BUFFALO CREEK DISESTABLISHED ANY ONEIDA NEW YORK RESERVATION

The 1838 Treaty of Buffalo Creek, 7 Stat. 550,

required the New York Oneidas to abandon any reservation in the State of New York. Thus, the Treaty of Buffalo Creek, subsequent case law, the removal policy of the United States government at the time the treaty was signed and other circumstances shows that the Oneidas' New York reservation was disestablished as a matter of law.

In Article 1 of the Treaty, the New York Oneidas and other tribes accepted a tract of land in Kansas "as a permanent home for all the New York Indians, now residing in the State of New York . . ." The Oneidas also agreed that the Kansas land was to be their "future home" and "agree[d] to remove to their new homes . . . as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." *Id.*, Arts. 2, 13. Thus, Congress intended, and the Oneidas agreed, to remove from New York and Wisconsin to Kansas permanently.

Equally clear is the fact that the Kansas lands were in exchange for the Oneidas' removal from the eastern lands, including lands in New York. Nowhere in the jurisprudence or commentary is it even suggested that the 1838 Treaty of Buffalo Creek was intended to create a Kansas reservation for the Oneidas <u>in addition</u> to a 300,000-acre parcel in New York.

Any doubt that the 1838 Treaty of Buffalo Creek disestablished the Oneidas' New York reservation was put to rest by this Court when, in the late nineteenth century, Indian tribes including the New York Oneidas successfully sued the federal government for the value of the Kansas lands that were set apart for them in the treaty, but later sold by the federal government after the tribes refused to remove to them.

While it might be reasonably contended that [the

> Indians'] failure to remove should result in a cancellation of the [Treaty of Buffalo Creek], and a restoration to them of their rights in the Wisconsin lands, that construction is precluded by the language of the first article, which contains a present and irrevocable grant of the Wisconsin lands, and puts it beyond their power to revoke the bargain.

New York Indians v. United States, 170 U.S. 1, 19 (1898).

Significantly, although the language of this Court's decision was limited to the Wisconsin reservation, the judgment was not so limited. The New York, Wisconsin and Thames Oneidas all shared in a nearly $2 million recovery flowing from the sale of the Kansas lands. *See id.*; *United States v. New York Indians*, 173 U.S. 464 (1899); *New York Indians v. United States*, 40 Ct. Cl. 448, 457-61 (1905); *In re Appeal of New York Indians*, 41 Ct. Cl. 462, 468-72 (1906) (collectively, the "*New York Indians* cases"). The New York Oneidas shared in that recovery because they held title to the Kansas lands granted to them by the 1838 Treaty of Buffalo Creek. That grant was not a gift. Rather, it was made in consideration of the Oneidas' agreement to move from and disestablish their New York and other eastern homes. Thus, the New York Oneidas sought and received the benefit of the 1838 Treaty of Buffalo Creek, *albeit* not the benefit they initially bargained for. The Court of Appeals, however, permitted the Oneidas to undo the bargain, while retaining the benefit, *i.e.*, the proceeds of the civil judgment.

Compounding its error, the Second Circuit required the presence of specific cession language to make a finding of reservation disestablishment. 337 F.3d at 158. To the contrary, this Court has made clear that what is required is that the "'congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.'"

DeCoteau v. District County Court for the Tenth Judicial District, 420 U.S. 425, 444 (1975) (quoting *Mattz v. Arnett*, 412 U.S. 481, 505 (1973)).

The face of the Treaty of Buffalo Creek, as well as the legislative history and surrounding circumstances, make clear that Congress intended to disestablish the Oneidas' New York reservation. First, Article 2 of the Treaty explicitly refers to the Indian Removal Act of 1830, the purpose of which was to "[m]ake a vast area available for white settlement while reducing the conflict of sovereign authority caused by the presence of independent Indian governments within state boundaries." Felix S. Cohen, *Handbook of Federal Indian Law*, 79 (1982 ed.).

Second, the legislative history of other congressional acts supports the view that Congress intended to disestablish the Oneidas' New York reservation. For example, the legislative history of 25 U.S.C. § 233, which conferred jurisdiction on the State of New York for civil actions between Indians (or to which Indians are parties) states that the "Oneida . . . Indians have no reservation" in New York State, H.R. REP. NO. 81-2720, at 2 (1949). Thus, consistent with the 1838 Treaty of Buffalo Creek and the decisions in the *New York Indians* cases, Congress (over one hundred years after the 1838 Treaty of Buffalo Creek was ratified) continued to express the view that the Oneidas' New York reservation was no more. This amply satisfies this Court's requirement that the congressional determination to terminate be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.

Third, as explained above, in the *New York Indians* cases, this Court held that title to the Kansas lands passed to the Oneidas at the time the Treaty of Buffalo Creek was made, and that the Indians' failure to assert title did not work a forfeiture of the title. *New York Indians*, 170 U.S. at 34.

Surely, Congress did not intend to pass title to land in Kansas to the Oneidas, while at the same time allowing a 300,000-acre reservation in New York to continue to exist. As a result, the *New York Indians* cases cannot be reconciled with the continuation of a New York reservation for the Oneidas.

Finally, the circumstances surrounding the Properties mandate a finding that the 1838 Treaty of Buffalo Creek disestablished the Oneida reservation. Although the "most probative" evidence of diminishment (or disestablishment) is statutory language, this Court also considers "the subsequent treatment of the area in question and the pattern of settlement there." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 330 (1998) (citing *Hagen v. Utah*, 510 U.S. 399 (1994)). The City of Sherrill is predominantly populated by non-Indians. In fact, the record below established that only .3% (three-tenths of one percent) of Sherrill's population is American Indian, Eskimo, or Aleut. Furthermore, New York State, and later the City of Sherrill, have exercised jurisdiction over this land from the time of the Properties' transfer from the Oneida Indians to non-Indians.

Therefore, it is beyond legitimate dispute that the 1838 Treaty of Buffalo Creek disestablished the Oneida reservation in New York.[7] This Court should grant the Petition to correct the Second Circuit's decision to the contrary.

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[7] At the very least, expert evidence was required to further elucidate the purpose of the 1838 Treaty of Buffalo Creek. That is yet another reason why summary judgment for the Oneida Indian Nation was improper and must be reversed.

III. INDIAN COUNTRY STATUS AND NON-INTERCOURSE ACT PROTECTION CEASE WHEN A TRIBE NO LONGER EXISTS

A final reason why the Petition should be granted is that the Second Circuit, in conflict with the decisions of other Courts of Appeals, improperly extended the scope of the Non-Intercourse Act, 25 U.S.C. § 177. The Non-Intercourse Acts protects Indian Country. Indian Country covers, at most, reservation, dependent communities and allotments of Indian tribes. 18 U.S.C. § 1151. Once an Indian Tribe no longer exists, the protections of the Non-Intercourse Act for the tribe cease and Indian Country status for the tribe's lands ceases. To restore Indian Country status if the tribe or a successor thereafter comes back into existence, an application must be made under the Indian Reorganization Act. The Second Circuit's holding to the contrary improperly expands the scope of the Non-Intercourse Act.

The Court of Appeals held that there is "no requirement in the law that a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land." 337 F.3d at 165. That is illogical, circular and incorrect. Rather, the Oneida Indian Nation has no rights under the Non-Intercourse Act, 25 U.S.C. § 177, and no claim to historical reservation status for the Properties, unless the Oneida Indian Nation has been in continuous tribal existence since the Properties became subject to the Act. *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994) ("*Paugussett*"); *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480 (1st Cir. 1987) (tribe may recover only if it shows that it was in continuous tribal existence and did not abandon tribal status from the time the land was alienated until the time of suit); *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 950 & n.7 (D. Mass. 1978), *aff'd*, 592 F.2d 575 (1st Cir. 1979).

The fact that Oneida Indian Nation is presently a federally recognized tribe is irrelevant to the protected status of lands it owns. "[T]ribal status for purposes of obtaining federal benefits is not necessarily the same as tribal status under the Non-Intercourse Act." *Paugussett*, 39 F.3d at 57. Thus, "[r]egardless of whether the BIA were to acknowledge [an Indian group] as a tribe for purposes of federal benefits, [the Indian group] must still turn to the district court for an ultimate judicial determination of its claim under the Non-Intercourse Act." *Id.* at 58.

The Second Circuit's logical fallacy is as follows: If there was a lapse in the Oneida Indian Nation's tribal status, Non-Intercourse Act coverage and Indian Country status both terminate at that moment in time. No other result is possible: How can land be Indian Country if the tribe that previously owned or used it has ceased to exist? How can land be owned by an Indian tribe or Indian nation if the tribe or nation has ceased to exist?

Once Indian Country status ends, or once the protection of the Non-Intercourse Act ceases, the land is then freely alienable, subject to state and local taxation; repurchase by the tribe does not create an exemption to taxation unless the lands are restored to trust protection under § 465 of the Indian Reorganization Act. *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998).

As Judge Van Graafeiland observed in dissent below, "authoritative sources" have explained the significance of tribal discontinuity on aboriginal rights.

- "Since original Indian title is dependent upon proof of actual, continuous, and exclusive possession, proof of voluntary abandonment of an area by a tribe

constitutes a defense to the aboriginal claim." Felix S. Cohen, *Federal Indian Law*, Ch. 9, Sec. A2a (1982 ed.).

• "The right of Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy . . . The possession, when abandoned by the Indians, attaches itself to the fee without further grant." *United States v. Cook*, 86 U.S. 591, 593 (1873).

• "We think it entirely clear that this treaty did not convey a fee simple title to the Indians; that under it no tribe could claim more than a right to continued occupancy; and that when this was abandoned all legal right or interest which both tribe and its members had in the territory came to an end." *Williams v. City of Chicago*, 242 U.S. 434, 437-38 (1917).

• "To establish a *prima facie* case based on a violation of the [Nonintercourse] Act, a plaintiff must show that ... the trust relationship between the United States and the tribe has not been terminated *or abandoned*." *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir.1994) (emphasis added).

• "Certainly individual Indians or portions of tribes may choose to give up tribal status.... If all or nearly all members of a tribe chose to abandon the tribe, then, it follows, the tribe would disappear." *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 587 (1st Cir. 1979).

• "By the treaty the Osages ceded and relinquished to the United States all of that reservation, and in consideration therefor the United States reserved, set

> apart, what later was known as the Kansas Reservation in which the Indians were given only the right of occupancy so long as they might choose to remain; and as already said they later chose to go elsewhere, which is a surrender and abandonment of the only right given to them by the treaty." *Shore v. Shell Petroleum Corp.*, 60 F.2d 1, 3 (10th Cir. 1932).

Id. at 171-72.

The record below contained substantial evidence that the New York Oneidas ceased to exist for a substantial period of time:

> • 1877: "[The Oneida] tribal government has ceased as to those who remained in [New York] state . . . [The designated chief's] sole authority consists in representing them in the receipt of an annuity.... They do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they are identified with the rest of the population." *United States v. Elm*, 25 F. Cas. 1006, 1008 (N.D.N.Y. 1877).
>
> • 1891: "The Oneida Indians have no reservation.... [The few Oneidas that remain] are capable and thrifty farmers, and travelers passing through the county are unable to distinguish in point of cultivation the Indian farms from those of the whites. The Oneida have no tribal relations, and are without chiefs or other officers." *1891 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior.*
>
> • The 1892 Census map of New York depicts no Oneida reservation.

• 1893: "The Oneidas have no reservation. Most of that tribe removed to Wisconsin in 1846. The few who remained retained 350 acres of land in Oneida and Madison counties, near the village of Oneida. This land was divided in severalty among them and they were made citizens." *1893 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior.*

• 1900: "The Cayuga and Oneida have no reservations. A few families of the latter reside among the whites in Oneida and Madison counties in the vicinity of the Oneida Reservation which was sold and broken up in 1846, when most of the Oneida removed to Wisconsin. What lands they have they own in fee simple, and the Oneida here are voters in the white elections. A considerable number of the Oneida live on the Onondaga Reservation." *1900 Annual Reports of the Department of the Interior.*

• 1901: "The Oneida have no reservation. Most of the tribe removed to Wisconsin in 1846. A few families are still living in Oneida and Madison counties, near the old Oneida Reservation and near the village of that name. They are citizens of New York and are entitled to vote at white elections.... At one time they owned several hundred acres of land, which they held in severalty, but they have sold most of it, and now have only a few small and scattered pieces." *1901 Annual Reports of the Department of the Interior.*

• 1906: "The New York Oneida have no reservation: in fact can hardly be said to maintain a tribal existence. About 100 of them have "squatted" on the Onondaga Reserve: so many of these have

intermarried with the Onondaga as to preclude any probability of their removal.... About 120 of them are carried on the agency rolls as "Oneidas at Oneida" which is somewhat misleading, as in reality this roll is made up of scattered families residing in Oneida, Madison, Livingston, Genesee, Herkimer, and other counties of the State." *1906 Annual Reports of the Department of the Interior.*

The non-existence of the New York Oneidas as a tribe persisted into the mid-twentieth century. For example, the record below also showed that in 1925, an Assistant Commission of Indian Affairs indicated in a letter that, as a tribe, the Oneidas are no longer known in the State of New York. Further, in the 1942 *Handbook of Federal Indian Law*, Cohen explains that the Oneidas are known no more in the State of New York. Felix S. Cohen, *Handbook of Federal Indian Law*, 416-17 (1942 ed.). Moreover, into the 1950's, in a Committee Report from the Senate Committee on Interior and Insular Affairs, the Committee acknowledged that the "Oneida and Cayuga Indians have no reservations." S. Rep. No. 1836, at 5 (1950).

Accordingly, the Second Circuit misinterpreted the scope of the Non-Intercourse Act, and wrongly affirmed the grant of summary judgment for the Oneida Indian Nation. The Petition should be granted to correct that error.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

December 10, 2003 Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JULY 21, 2003

United States Court of Appeals,
Second Circuit.

ONEIDA INDIAN NATION OF NEW YORK, Plaintiff-Counter-Defendant-Appellee,
Ray Halbritter, Keller George, Chuck Fougnier, Marilyn John, Clint Hill, Dale
Rood, Dick Lynch, Ken Phillips, Beulah Green, Ruth Burr, Brian Patterson, and
Iva Rodgers, Consolidated-Defendants-Appellees,

v.

CITY OF SHERRILL, NEW YORK, Defendant-Counter-Claimant-Appellant,
Madison County, Amicus Curiae-Appellant,
Oneida County, Amicus Curiae,
State of New York, Amicus Curiae.

Docket Nos. 01-7795, 01-7797.

Argued: May 13, 2002.
Decided: July 21, 2003.

Before: VAN GRAAFEILAND, MESKILL, and B.D. PARKER, Jr., Circuit Judges.

Judge VAN GRAAFEILAND dissents in part in a separate opinion.

B.D. PARKER, Jr., Circuit Judge.

This case, consisting of four actions, addresses whether properties reacquired by the Oneida Indian Nation of New York ("OIN" or "the Oneidas") are subject to taxation by the City of Sherrill, New York and Madison County, New York. The OIN is a federally recognized Indian tribe, governed by a Nation Representative and a Tribal Council.[1] The Oneidas lived on what became central New York State long before the founding of the United States. In the late eighteenth century most of the Oneidas' ancestral land was formally set aside by Congress as reservation land. During the nineteenth century much of it was sold to non-members of the tribe. But starting in the 1990s members of the tribe reacquired parcels in open-market transactions, and in 1997 and 1998 the purchases included several businesses and properties in Sherrill.[2] These properties include two upon which the Oneidas operate a gasoline station, a convenience store, and a textile manufacturing and distribution facility (the "Sherrill Properties" or the "properties"). Contending that these properties are within their reservation and are, consequently, not subject to taxation, the Oneidas refused to pay the property taxes or to collect sales taxes on merchandise sold at the businesses.

Following this refusal, Sherrill purchased three of the properties at tax sales and, two years later, recorded deeds. Sherrill also started formal eviction proceedings. In

[1] Despite our use of the "OIN" acronym, the Oneida Indian Nation of New York should not be confused with the original Oneida Indian Nation, which is not a federally recognized tribe and is not a party to these consolidated cases. As discussed infra, the original Oneida Indian Nation became divided into three distinct bands, the New York Oneidas, the Wisconsin Oneidas, and the Canadian Oneidas, by the middle of the nineteenth century.

[2] Located in Oneida County, Sherrill is the State's smallest city, occupying one-and-one-half square miles with a population of approximately 3000 and an annual budget of $2.4 million.

response, the Oneidas sued Sherrill in the United States District Court for the Northern District of New York (the "Lead case"), contending that the land, as part of their historic reservation recognized principally by the 1794 Treaty of Canandaigua, is exempt from state and municipal taxation. The suit sought declaratory and injunctive relief prohibiting the evictions and the imposition of property taxes. Although the Sherrill Properties were purchased from non-Oneidas, the Oneidas claim that their purchases reestablished the properties as reservation land because the federal government--which alone has the power to do so--has never changed the reservation status of the land.[3] Sherrill counterclaimed, seeking declaratory and injunctive relief and damages, asserting that, for a variety of reasons, the land had lost its reservation status and that the OIN has been unjustly enriched by municipal benefits received, but not paid for, after reacquisition.

Sherrill also petitioned the New York State Supreme Court, Oneida County, to order the eviction of the OIN from the properties (the "Eviction case"). The OIN, citing federal preemption, removed to federal court, contending that sovereign immunity barred Sherrill's claims. In response to this defense, Sherrill filed an action against the individual members of the Tribal Council (the "Members case"). Sherrill again sought eviction and also sought injunctive relief, forbidding council members from purchasing additional properties in the city.

These three cases were related to an additional action (the "Related case"), brought by the OIN against Madison County, concerning thirteen parcels of land also purchased by the OIN in the 1990s. As in the Lead case, the Oneidas

[3] It appears that the Sherrill Properties were transferred to an individual OIN member in 1805 and by that member to a non-Indian in 1807, and were thereafter owned by several private parties until their reacquisition.

sought declaratory relief that these properties are not subject to taxation, contending that, notwithstanding intervening non-Indian possession, these properties have remained reservation land.

Procedural strife followed. In the Lead case, Sherrill moved for summary judgment, for injunctive relief, and to amend its answer to add various affirmative defenses. The OIN opposed the motions and cross-moved for summary judgment in the Lead and Eviction cases, asserting principally that the parcels in question were non-taxable because they were located on reservation land in Indian country. *See* 18 U.S.C. § 1151. In the Members case, the OIN officers moved to stay or, in the alternative, to dismiss principally on grounds of sovereign immunity and the failure to name the OIN as a party. Madison moved to dismiss the Related case for failure to join two allegedly indispensable parties: the Wisconsin and Thames Oneidas. In November 2000, the State of New York, Madison and Oneida Counties, and a public company, Oneida Ltd., filed briefs as *amici curiae* in the Lead case in support of Sherrill's motion for summary judgment and in opposition to the OIN's cross- motion.

After the dust settled, the District Court issued a well-reasoned opinion resolving these various motions. *Oneida v. City of Sherrill*, 145 F.Supp.2d 226 (N.D.N.Y.2001) ("*Oneida IV*"). It considered a number of issues but devoted a good deal of attention to what the parties considered--and what we agree--to be the basic question posed: whether the properties are in Indian country. *Oneida IV*, 145 F.Supp.2d at 241. The court concluded that, for a number of reasons, they are. The properties are part of the Oneidas' aboriginal lands and federally recognized reservation. The reservation's status was guaranteed by treaty obligations--principally in the 1794 Treaty of Canandaigua--and Sherrill did not carry its burden of demonstrating congressional action disestablishing the reservation. Accordingly, the District Court concluded

that, as they are in Indian country, neither the Sherrill nor Madison Properties are taxable by Sherrill and Madison County, and granted the OIN judgment on its claims in the Lead case. *Id.* at 254-259.

Determining that the OIN was entitled to sovereign immunity, the court also granted judgment on Sherrill's counterclaims in the Lead case and denied Sherrill leave to amend its complaint. *Id.* at 258-59. The court granted the OIN judgment in the Eviction case as well, concluding that it was entitled to sovereign immunity. It also granted the council members' motion to dismiss in the Members case, concluding that they too were entitled to sovereign immunity and that, in any event, Sherrill had failed to join the OIN, which the court found to be an indispensable party. Finally, the court *sua sponte* granted the OIN judgment on the pleadings in the Related case, concluding that its findings with respect to the Sherrill Properties applied also to those located in Madison. Separately, the court denied Madison County's motion to dismiss that case. *Oneida Indian Nation of N.Y. v. Madison County*, 145 F.Supp.2d 268, 270-71 (N.D.N.Y.2001). Sherrill and Madison appealed.[4] We agree with the District Court's principal conclusion that the OIN's Sherrill Properties are not taxable, and therefore affirm the judgment in the Lead, Eviction, and Members cases. Because we find, however, that the court's *sua sponte* grant of judgment on the pleadings in the Related case was procedurally improper, we vacate this judgment and remand for further proceedings.

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[4] Sherrill appeals from the three separate judgments entered by the District Court on June 4, 2001, in the Lead, Eviction and Members Case, considered under docket number 01-7795. Madison appeals from the District Court's entry of judgment in the Related case, as well as the court's order denying its motion to dismiss, considered under docket number 01-7797. On appeal, Madison, Oneida County, and the State of New York have appeared as amici curiae on the Lead, Eviction, and Members cases. They will be referred to collectively as the "amici."

BACKGROUND

I. Treaties Governing Rights to the OIN's Land

Since the land in question has been the subject of federal litigation off and on for more than one hundred and fifty years, before looking at the controlling legal issues, we briefly review how we reached this point in time. As previously noted, the parties contest whether land first occupied by the Oneidas in upstate New York before the founding of this country is, upon reacquisition by the Oneidas, subject to taxation by New York State and its municipalities.

The Oneidas are the direct descendants of members of the original Oneida Indian Nation, one of the six nations of the Iroquois Confederacy (the "Six Nations"), which were the most powerful Indian tribes in the northeastern United States at the time of the American Revolution. *County of Oneida, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 230, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) ("*Oneida II*") (citing B. Graymont, *The Iroquois in the American Revolution* (1972)). The Six Nations are the Cayugas, Mohawks, Oneidas, Onondagas, Senecas, and Tuscaroras. *New York Indians*, 170 U.S. 1, 36, 18 S.Ct. 531, 42 L.Ed. 927 (1898) ("*New York Indians II*"). From time immemorial through the Revolutionary period, the Oneidas inhabited what is now central New York State. Their aboriginal lands covered approximately six million acres, from the Pennsylvania border to the St. Lawrence River, and from the shores of Lake Ontario to the western foothills of the Adirondack Mountains. *Oneida II*, 470 U.S. at 230, 105 S.Ct. 1245.

A. Nonintercourse Act and Canandaigua Treaty

With the adoption of the Constitution, Indian relations came exclusively under federal authority. *See Oneida II*, 470 U.S.

at 234, 105 S.Ct. 1245; *Oneida Indian Nation of N.Y. v. New York*, 194 F.Supp.2d 104, 146 (N.D.N.Y.2002) (*Oneida IIIb*) ("[A]ny rights [in Indian land] possessed by the State prior to ratification of the Constitution were ceded by the State to the federal government by the State's ratification of the Constitution."). Article I, section 8, clause 3 of the Constitution, the Indian Commerce Clause, established Congress's power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. I, § 8, cl. 3.

In 1790, Congress passed the first Indian Trade and Intercourse Act (the "Nonintercourse Act"), 1 Stat. 137, sharply limiting the alienability of Indian land. In essence, the Nonintercourse Act required federal consent for all land purchases from Indian nations. The 1793 amendments to the Act, which contain the language currently in effect, provided:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

Act of March 1, 1793, 1 Stat. 329 (1793) (codified at 25 U.S.C. § 177 (2000)); *see generally Mohegan Tribe v. Connecticut*, 638 F.2d 612, 616-18 (2d Cir.1980) (discussing history of and amendments to Nonintercourse Act).

The Supreme Court has consistently applied the principle, embodied in the Nonintercourse Act, that federal consent is required for purchases of Indian land or for the termination of aboriginal title. *See, e.g., Oneida II*, 470 U.S. at 232, 105 S.Ct. 1245; *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345, 62 S.Ct. 248, 86 L.Ed. 260 (1941) ("Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of

occupancy, which could only be interfered with or determined by the United States.") (citing, among other authorities, *Johnson v. McIntosh*, 8 Wheat. 543, 5 L.Ed. 681 (1823) (refusing to recognize land titles originating in grants by Indians to private parties in 1773 and 1775 because they were contrary to principle that Indian title could only be extinguished by or with consent of federal government)). The absence of federal consent is the Oneidas' central argument in this litigation.

Another pivotal enactment was the 1794 Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794). This treaty recognized that the Oneida reservation covered approximately 300,000 acres,[5] and the federal government undertook that it "[would] never claim [this land], nor disturb [the Oneidas] ... in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." 7 Stat. 45. On the strength of this treaty, which remains in force, the Oneidas contend that the land in Madison and Sherrill is reservation land in Indian country and, upon reacquisition, must be treated as such.

B. Indian Removal and the Treaty of Buffalo Creek

Notwithstanding the Nonintercourse Act's prohibition on purchases of Indian land, and despite federal government

[5] Prior to 1794, the Oneidas ceded substantial portions of their aboriginal lands to New York State. In 1785, by the Treaty of Fort Herkimer, the Oneidas ceded approximately 300,000 acres to New York State. *Oneida Indian Nation of N.Y. v. New York*, 860 F.2d 1145, 1148 (2d Cir.1988). In 1788, by the Treaty of Fort Schuyler, the Oneidas ceded approximately 5 million more acres to the State and retained 300,000 acres as a reservation. *Oneida II*, 470 U.S. at 231, 105 S.Ct. 1245, *Oneida IIIb*, 194 F.Supp.2d at 112. The Sherrill Properties and, it appears, the Madison properties, were part of the territory reserved to the Oneidas. *Oneida IV*, 145 F.Supp.2d at 234.

advice to the contrary,[6] New York State repeatedly purchased Indian land within its borders. In a 1795 transaction, for instance, the OIN conveyed virtually all of its remaining land to New York in exchange for annual cash payments. *Oneida II*, 470 U.S. at 232, 105 S.Ct. 1245. Overall, more than thirty treaties of purchase were made with various segments of the tribe during the late eighteenth and early nineteenth centuries. *See* Jack Campisi, *Oneida, in 15 Handbook of North American Indians* 484 (Bruce G. Trigger ed., 1978) (hereinafter "Campisi"). The Madison properties purportedly were conveyed to the State in this manner. As Oneida lands were transferred to the State, they were surveyed and laid out in townships, which eventually were subdivided and sold to private parties. Individual Oneidas also sold land to private parties. The Sherrill Properties fall into this group of conveyances. The Oneidas contend that to the extent any of the purchases lacked congressional approval, they violated the Nonintercourse Act and the Treaty of Canandaigua.

Early in the nineteenth century, federal policy concerning eastern Indians changed from maintenance of their right of occupancy in ancestral lands to their removal west of the Mississippi River. This change was spurred by the states' desire to control the remaining unceded Indian land within their boundaries, by the incursion of settlers onto treaty-protected Indian land, and by the perceived inability of the Indians to assimilate. *See* David H. Getches et al., *Cases and Materials on Federal Indian Law* 93-95 (4th ed.1994)

[6] Colonel Timothy Pickering, the United States Secretary of War following the Treaty of Canandaigua, upon the recommendation of the United States Attorney General, ordered the Superintendent of the Affairs of the Six Nations not to aid New York in any purchases of Indian land and forwarded to New York Governor George Clinton a copy of the Attorney General's opinion that title to the Six Nations' land could be extinguished only by a treaty entered into under authority of the United States. See Seneca Nation of Indians v. New York, 206 F.Supp.2d 448, 494 (W.D.N.Y.2002).

(hereinafter "Getches"); Felix S. Cohen, *Handbook of Federal Indian Law* 53-54 (1942) (hereinafter "Cohen"). Removal was deemed necessary to "mak[e] available for white settlement a vast area and solving the problem of conflict of authority caused by a presence of Indian nations within state boundaries." Cohen at 53.

Between 1810 and 1816, the Six Nations, facing pressure from New York State to remove,[7] purchased approximately 500,000 acres in Wisconsin from the Menominee and Winnebago tribes.[8] *New York Indians II*, 170 U.S. at 11-14, 18 S.Ct. 531. Several hundred Oneidas moved there during the 1820s, with only a small number remaining in New York. *Id.* at 14, 36, 18 S.Ct. 531; *United States v. Boylan*, 265 F. 165, 167 (2d Cir.1920); Campisi at 485. Those who stayed "held a single and undivided tract reserved out of the original Oneida reservation." *Boylan*, 265 F. at 167.

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[7] Ogden Land Company, which held preemption rights to Indian lands in New York State, wished to free the remaining reservation land in the State from Indian title. Eleazar Williams, an Episcopal lay reader and catechist who had moved to the Oneida reservation, persuaded a large group of Oneidas and members of other tribes to emigrate and assisted in making the arrangements for their removal with the Wisconsin tribes. Francis Paul Prucha, *American Indian Treaties* 96, 202 (1997) (hereinafter "Prucha"); Campisi at 485. Williams' motive, however, differed from that of the State and Ogden; he sought the "establishment of an Iroquois ecclesiastical empire with himself as its leader ... resettled in the vastness of Wisconsin." Campisi at 485.

[8] The purchase was made on behalf of the Six Nations (excluding the Mohawks, who had withdrawn to Canada) and the St. Regis, Stockbridge, and Munsee tribes. The terms of this purchase and another made in 1822 were memorialized in a treaty between the federal government and the Menominee in 1831, to which the New York Indians gave their assent in 1832. *See New York Indians II*, 170 U.S. at 14, 18 S.Ct. 531; Treaty of Buffalo Creek, 7 Stat. 550, Preamble (1838) (proclaimed April 4, 1840).

In 1830, Congress passed the Indian Removal Act, which reflected this shift in federal policy and allowed Indians to exchange their eastern lands for lands set aside in the west.[9] *See* Act of May 28, 1830, 4 Stat. 411. The Act provided:

> That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States, west of the river Mississippi, not included in any state or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there . . .

Ch. 148, 4 Stat. at 411-12

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[9] The impetus for the Removal Act was a conflict between Georgia and its Cherokee Indian inhabitants. Georgia, desiring complete jurisdiction over the lands within its territory, had signed a compact with the federal government in 1802 by which the state relinquished its western lands (which ultimately became the states of Mississippi and Alabama) in return for a promise by the United States to extinguish Cherokee Indian title to Georgia lands "as early as the same can be peaceably obtained on reasonable terms." Prucha at 156. When the federal government failed to live up to its part of the bargain, Georgia itself denied the Indians' title and jurisdiction over the lands in question and considered the treaties it had signed with the Indians--which recognized Indian title and political autonomy--invalid. *Id.* at 157. These actions led to significant objections by the northern states. After heated debates in Congress concerning Indian rights, in particular the relative sanctity of their treaty-making power, the Indian Removal Act was passed, and the Cherokees' removal from Georgia was complete by 1838. *Id.* at 161-65.

The 1838 Treaty of Buffalo Creek, 7 Stat. 550 (Jan. 15, 1838), was enacted pursuant to this removal policy. Prucha at 202. Stimulated by the desire of Buffalo city leaders to "make room for the expansion of the city onto adjacent Seneca reservation lands," New York began a "full-scale drive ... to eliminate the Indians from the state and move them to lands west of Missouri." *Id.* Under the Treaty, the Six Nations and the St. Regis Indians agreed to remove from their New York and Wisconsin reservation lands to approximately 1.8 million acres in Kansas, which had been set aside as Indian territory. The Treaty provided that the new reservation lands were to provide "a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes." Buffalo Creek Treaty, art. 2. The Treaty authorized a payment of $400,000 to cover the costs of removal. As discussed below, Sherrill and Madison claim that it effected the disestablishment of the Oneidas' reservation and the formal relinquishment, with congressional approval, of their possessory claim to the lands at issue.

The first eight articles and Article 15 of the Treaty set forth this basic bargain. *Id.*, arts. 1-8, 15. Articles 9 through 14 reflect specific agreements between the government and individual tribes. *Id.*, arts. 9-14. In Article 10, for example, the Senecas agreed to remove within five years to land in eastern Kansas, and the government approved the sale of their remaining New York land to two individuals, Thomas L. Ogden of the Ogden Land Company and Joseph Fellows. *Id.*, art. 10; *see New York Indians*, 72 U.S. (5 Wall.) 761, 767, 18 L.Ed. 708 (1867) ("*New York Indians I*"). The Tuscaroras made a similar removal commitment in Article 14, which also confirmed the sale of their New York land to Ogden and Fellows. Buffalo Creek Treaty, art. 14.

At the time of the Treaty, only approximately 5000 of the original 300,000 acres of Oneida reservation land remained in their hands, the rest having been sold to New York or to private parties. Around 620 Oneidas still resided in New York. Buffalo 150 Creek Treaty, Sch. A, Add. 29. Article 13 of the Treaty provided for the removal of these Oneidas, but only upon certain conditions:

> The United States will pay the sum of four thousand dollars, to be paid to Baptista Powlis, and the chiefs of the first Christian party residing at Oneida, and the sum of two thousand dollars shall be paid to William Day, and the chiefs in securing the Green Bay country, and the settlement of a portion thereof; *and they hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Government of the State of New York for the purchase of their lands at Oneida.*

Buffalo Creek Treaty, art. 13 (emphasis added).

The wholesale removal of the New York Indians to Kansas contemplated by the Treaty never occurred. *See New York Indians II*, 170 U.S. at 26-27, 18 S.Ct. 531 (noting that provision was only made for the "actual removal of more than about 260 individuals of the claimant tribes," and that none of the thirty two Indians who actually received Kansas allotments ever settled permanently there). For their part, the Oneidas residing in New York and Wisconsin refused to relocate to Kansas. *See New York Indians II*, 170 U.S. at 9-10, 18 S.Ct. 531. Hundreds of New York Oneidas moved instead to Wisconsin and to Ontario, Canada. By 1848 only approximately 200 Oneidas resided in New York. Campisi at 485. Thus, by the middle of the nineteenth century, three distinct bands of the tribe existed: the New York Oneidas, the Wisconsin Oneidas, and the Canadian ("Thames") Oneidas. *Oneida IV*, 145 F.Supp.2d at 235.

The record does not reflect any large block sales of reservation land to New York State by the Oneidas after 1842, when 1100 acres were conveyed. But as the exodus of members continued over the next half-century, reservation acreage inhabited by Oneidas shrank significantly, by some accounts to less than 100 acres. *See Boylan*, 265 F. at 165 (discussing action brought by federal government, on behalf of Oneidas, seeking ejectment of defendants from thirty- two acres of land, forming part of original Oneida reservation); Annual Report, Commissioner of Indian Affairs, 1890, 1893 (stating that the Oneida reservation contained only approximately 350 acres in 1890, and approximately 100 acres in 1893 when the tribe's New York branch itself numbered less than 200).

II. Land Claims Involving the OIN

Litigation involving the OIN and other New York Indians followed the Treaty of Buffalo Creek. Ogden and Fellows, who held fee title to Seneca lands under the Treaty, sued New York to void pre-removal tax assessments after the parcels had been sold to third parties because of the Senecas' nonpayment of state taxes. *New York Indians I*, 72 U.S. at 764-65. In 1867, the Supreme Court held that the taxation of the parcels was "premature and illegal" because it interfered with the Indians' possessory rights guaranteed by the federal government. "Until the Indians have sold their lands, and removed from them in pursuance of the treaty stipulations, they are to be regarded as still in their ancient possession, and are in under their original rights, and entitled to the undisturbed enjoyment of them." *Id.* at 770.

As noted, most of the Six Nations Indians did not remove to Kansas. The federal government disposed of the Wisconsin lands conveyed to it by the Indians, appropriated the unoccupied Kansas land and placed it in the public domain

for sale to settlers. *New York Indians II*, 170 U.S. at 4, 24, 18 S.Ct. 531. The New York Indians sued, claiming entitlement to the Kansas lands ceded to them under the Treaty, and seeking the value of the land sold and the money the government had agreed to pay on their removal. *Id.* at 1-2, 18 S.Ct. 531.

Eventually the case reached the Supreme Court, which held in 1898 that the Buffalo Creek Treaty effected a present grant of the Kansas lands to the Indians and that forfeiture of these lands could occur only through legislative action. Simply opening the land to settlement, as the federal government had done, was insufficient. Accordingly, the Court concluded that the New York Indians, including the Oneidas, were entitled to money damages. *Id.* at 25- 36, 18 S.Ct. 531.

Litigation involving the Oneidas' proprietary rights in their New York reservation lands began in the late nineteenth century. In 1885, some Oneidas conveyed reservation parcels to non-Indians but continued to live on the land. After the Indian occupants failed to meet mortgage obligations, the owner brought a foreclosure action and, following partition, the Indians were ejected. Reaffirming the principles embodied in the Nonintercourse Act, we held the ejectment improper because the original conveyance lacked the approval of the federal government: the "tribe could not sell, nor the individual members, for they have not an undivided interest in the tribal lands, nor alienable interest in any particular tract." *Boylan*, 265 F. at 174. We emphasized that "[a] transfer of the allotment to [non-Indians] is not simply a violation of the proprietary rights of the Indians; it violates the government rights of the United States." *Id.* at 173.

Many decades later, in 1970, the Oneidas sued Oneida and Madison Counties as a consequence of their occupation of an approximately 900-acre tract ceded by the OIN to New York in 1795. The Oneidas claimed that the occupation violated

the Nonintercourse Act and sought to recover the land's fair rental value for a two-year period in the 1960s. The case reached the Supreme Court, which again affirmed the Oneidas' aboriginal possessory rights, concluding that the Nonintercourse Act and certain treaty obligations prohibited termination of these rights without federal approval. *See Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 675-78, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) ("*Oneida I*") (stating that the Oneidas had asserted "the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession").

On remand, the district court found the counties liable to the Oneidas, and we affirmed. *Oneida Indian Nation of N.Y. v. County of Oneida*, 719 F.2d 525 (2d Cir.1983). Hearing the case for a second time, the Supreme Court again affirmed, holding that the Oneidas could maintain a federal common law action based on the counties' allegedly illegal occupation of their lands and that the Nonintercourse Act did not preempt the tribe's claims. *Oneida II*, 470 U.S. at 236-40, 105 S.Ct. 1245. The watershed decisions in *Oneida I* and *Oneida II* established the OIN's right to challenge the deprivation of its historic title by the sales to New York in the late eighteenth and early nineteenth centuries.[10]

In 1974, the OIN and the Wisconsin Oneidas brought a similar suit against Oneida and Madison Counties, but of considerably greater scope. The Oneidas alleged that between

[10] The damages phase of this case has just recently concluded, more than thirty years after the case commenced, with the Oneidas receiving approximately $35,000 plus prejudgment interest from Oneida and Madison Counties. *See Oneida Indian Nation of N.Y. v. County of Oneida*, N.Y., 217 F.Supp.2d 292 (N.D.N.Y.2002).

1795 and 1846, pursuant to some thirty agreements, New York State illegally acquired approximately 250,000 acres of Oneida reservation land in violation of the Nonintercourse Act. *See Oneida Indian Nation of N.Y. v. County of Oneida, N.Y.*, 199 F.R.D. 61, 66 & n. 3 (N.D.N.Y.2000) ("*Oneida IIIa*"). The case was inactive during the pendency of *Oneida I and II*. In 1998, the United States intervened and joined the Oneidas in moving to add as defendants approximately 20,000 private landowners whom the Oneidas claimed were either liable for money damages or should be ejected. In September 2000, the district court concluded, following *Oneida II*, that the Oneidas could sue state entities for damages based on the illegal occupation of their historic reservation land but that ejectment and money damages from the individual landowners was not available, and the court declined to permit their joinder. *See Oneida IIIa*, 199 F.R.D. at 79-94.

In 1978 and 1979, the Oneidas also challenged New York State's purchases of their aboriginal lands in 1785 and 1788, under the Treaties of Fort Herkimer and Fort Schuyler, as violations of the Articles of Confederation, the Treaty of Fort Stanwix, and the 1783 Proclamation. We concluded, however, that the State had the right to make such purchases during the confederal period and dismissed the action. *See Oneida Indian Nation of N.Y. v. New York*, 860 F.2d 1145 (2d Cir.1988).

The next major litigation to reach our court was this group of consolidated cases where, as we have seen, the District Court granted summary judgment to the OIN, determining that the Sherrill and Madison Properties remained reservation land immune from local taxation.

DISCUSSION

We review the grant of a motion to dismiss or a motion for summary judgment de novo, drawing all reasonable inferences in favor of the nonmoving party. *See Chambers v. Time Warner*, 282 F.3d 147, 152 (2d Cir.2002); *Young v. County of Fulton*, 160 F.3d 899, 902 (2d Cir.1998). In reviewing a dismissal pursuant to Federal Rule of Civil Procedure 12(b)*(*6), we accept as true all material facts alleged in the complaint. *Chambers*, 282 F.3d at 152. "Dismissal is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief." *Id.* (citation and internal quotation marks omitted). We apply this same standard in reviewing a grant of judgment on the pleadings pursuant to Rule 12(c). *Burnette v. Carothers*, 192 F.3d 52, 56 (2d Cir.1999). Summary judgment is appropriate if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

I. Basic Principles

Three basic principles inform the disposition of this action. The first is the Indians' right of occupancy on tribal land, or "Indian country," which "may extend from generation to generation, and will cease only by dissolution of the tribe, or their consent to sell to the party possessed of the right of pre-emption." *New York Indians I*, 72 U.S. at 771. The second, embodied by the Nonintercourse Act, is federal preeminence over the disposition of land in Indian country. Since "Congress alone has the right to say when the [United States'] guardianship over the Indians may cease," *Boylan*, 265 F. at 171, the sale or conveyance of reservation land can only be made with congressional sanction, that is, "by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177 (2000). The third is federal preemption, which prohibits states from imposing property taxes upon Indian

reservation land without congressional approval. *New York Indians I*, 72 U.S. at 771; *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982) ("The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."); *cf. Boylan*, 265 F. at 170.

There is no material dispute that the Sherrill Properties were part of the Oneidas' aboriginal land and the tribe's reservation as recognized by the Treaty of Canandaigua. Sherrill contends, however, that because the properties are no longer within Indian country and the Oneidas no longer exist as a tribe, they are subject to taxation. We first address these contentions and then turn to the District Court's procedural rulings.

II. Indian Country

In general, "Indian country" refers to the geographic area in which tribal and federal laws normally apply and state laws do not. Section 1151 of Title 18 of the United States Code, defining "Indian country," provides:

> The term "Indian country" ... means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2000).[11]

Dependent Indian communities encompass any "area ... validly set apart for the use of the Indians as such, under the superintendence of the Government." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). Indian allotments are those parcels allocated to tribes, as opposed to those opened to settlers, under federal policies designed to accommodate the westward movement of settlers and to promote the integration of Indians into the wider society. *See generally Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 106-07, 118 S.Ct. 1904, 141 L.Ed.2d 90 (1998) (discussing federal allotment policy). Under § 1151, "[o]nce a reservation has been established, or a dependent Indian community shown to exist, it will remain Indian country until terminated by Congress, irrespective of the nature of the land ownership." Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 513 (1976).

As noted, land in Indian country, including reservation land, is not subject to state taxation absent express congressional authorization. "The treaties and laws of the United States

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[11] Although § 1151 is a criminal statute, it "generally applies as well to questions of civil jurisdiction." *DeCoteau v. District County Court*, 420 U.S. 425, 428 n. 2, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975). It codified the Act of June 25, 1948, 62 Stat. 757, which was passed to correct jurisdictional conflicts arising from allotment policy and the subsequent restoration of surplus lands to tribal ownership in the Indian Reorganization Act. *Hagen v. Utah*, 510 U.S. 399, 425, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) (Blackmun, J., dissenting). Its practical effect "was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments." *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993) (quotation omitted).

contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union." *Worcester v. Georgia*, 31 U.S. 515, 557, 6 Pet. 515, 8 L.Ed. 483 (1832); *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985) ("[T]he Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear."); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 173-81, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973).

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789, 65 S.Ct. 989, 89 L.Ed. 1367 (1945). It traces from the "doctrine of discovery," the law of Indian land tenure which the Supreme Court developed in the early nineteenth century to reflect European policy toward the Indians and to explain Indian sovereignty relative to colonial authority. *See Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 572-74, 5 L.Ed. 681 (1823). The doctrine provided that the "discovering" European nations (and later the United States) held fee title to Indian aboriginal lands, subject to the Indians' right of occupancy and use. *Oneida II*, 470 U.S. at 234. As a result, no one could purchase Indian land or otherwise terminate aboriginal title without the consent of the discovering nation's sovereign. *Id.* As Chief Justice Marshall explained in *Johnson v. McIntosh*:

> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful

> occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

Johnson, 21 U.S. (8 Wheat.) at 574.

Generally speaking, nineteenth and twentieth century federal policy was consistent with this approach to Indian sovereignty, despite a notably inconsistent vision of the Indians' relationship to non-Indian citizens. While the tribes exercise inherent sovereign authority over their members and land located within state boundaries, they are nevertheless "domestic dependent nations" under federal protection. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17, 5 Pet. 1, 8 L.Ed. 25 (1831); *see also Boylan*, 265 F. at 172. The land they occupy is owned by the United States, which has retained the authority to regulate conveyances. As we have observed, "[w]hile the state[s] ha[ve] a right to make treaties with the Indians, [they] cannot interfere with the right [s] and obligations of the federal government." *Boylan*, 265 F. at 173. Although Indians' dependent status prohibits domestic and international political recognition, "it does assure them self-government, free of most state law strictures, over their territory and members, and, to a more limited extent, over non-Indians." Getches at 373-74; *see Boylan*, 265 F. at 174.

This "platonic notion[ ] of sovereignty," embodied in the so-called "Indian sovereignty doctrine," historically gave state law "no role to play" within a tribe's territorial boundaries. *McClanahan*, 411 U.S. 164, 168, 172, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). While courts have moved towards reliance on firmer, more textually based concepts such as

federal preemption to definitively resolve the rights of Indian tribes vis-à-vis the states, see *id.*, the Indian sovereignty doctrine remains relevant because it provides a backdrop against which the applicable treaties and federal statutes must be read.

A. Set Aside and Superintendence

Sherrill contends that, even accepting the proposition that the properties are located within the Oneida reservation's historic boundaries, the parcels are taxable because they are not currently located within Indian country. Principally relying on *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998), Sherrill asserts that the properties are not in Indian country because they were neither set aside by the federal government for Indian use nor placed under federal superintendence. Rather, the properties were acquired in private, open-market transactions and receive services from Sherrill, not the federal government.

In *Alaska*, the Supreme Court considered whether certain nonreservation land owned by members of the Venetie tribe in fee simple was located in Indian country. *Id.* at 527, 118 S.Ct. 948. The land had been part of the Neets'aii Gwich'in reservation, which had been disestablished pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. § § 1601 *et seq.* Title was then conveyed to the Venetie native corporations as tenants in common, which in turn transferred title to the tribe. *Id.* at 524, 118 S.Ct. 948. Because the reservation had been disestablished, and because no allotments were involved, "whether the Tribe's land is Indian country depend[ed] on whether it f[e]ll[ ] within the 'dependent Indian communities' prong of the statute, § 1151(b)." *Id.* at 527, 118 S.Ct. 948. The Court concluded that the land was not Indian country because it neither had been "set aside by the Federal Government for the use of the

Indians as Indian land" nor was "under federal superintendence"--two requirements, the Court found, that applied equally to reservations, dependencies, and allotments. *Id.* at 527, 532-34, 118 S.Ct. 948.

Sherrill argues that because the OIN, like the Venetie, purchased the properties in fee and can freely alienate them, the land cannot be in Indian country. We disagree. While questions may arise as to whether nonreservation property owned by Indians is in Indian country, there are no such questions with regard to reservation land, which by its nature was set aside by Congress for Indian use under federal supervision. *See United States v. John*, 437 U.S. 634, 638-47, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978) (holding that tribe's fee simple parcels on historic reservation were under federal control despite the fact that federal supervision of the tribe had not been continuous); *cf. Donnelly v. United States*, 228 U.S. 243, 269, 33 S.Ct. 449, 57 L.Ed. 820 (1913) (holding that reservation land is Indian country).[12]

Because the Sherrill Properties are located on the Oneidas' historic reservation land set aside for the tribe under the Treaty of Canandaigua, they satisfy the set aside and superintendence requirements of 18 U.S.C. § 1151.[13]

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[12] The *Alaska* Court itself noted that it "had also held, not surprisingly, that Indian reservations were Indian country." 522 U.S. at 528 n. 3, 118 S.Ct. 948; *see also id.* at 528-30, 118 S.Ct. 948 (discussing cases where the Court had found "that Indian lands that were *not* reservations could be Indian country" (emphasis added)).

[13] Sherrill's argument that the Oneidas' land does not meet federal set aside requirements because it was originally allocated to the Indians by New York State, rather than the United States, is incorrect. The 300,000 acres were a carve-out from the 1788 Treaty of Fort Schuyler, and represented that portion of the Indians' aboriginal homeland that had not been conveyed to New York and thus never became state land. Oneida II, 470 U.S. at 231, 105 S.Ct. 1245, Oneida IIIb, 194 F.Supp 2d at 139

Moreover, just as *Alaska* concluded that the "mere provision" of federal services on the tribe's property did not make it Indian country, the provision of certain state services to the Oneidas by Sherrill does not eliminate that status. *See Alaska*, 522 U.S. at 534, 118 S.Ct. 948.

B. Alienability

Alternatively, Sherrill argues that the properties are not in Indian country because they are freely alienable. Relying on *Cass County*, Sherrill contends that the reacquisition of freely alienable, former reservation land by an Indian tribe "does not cause the land to resume tax- exempt status ... unless and until [it is] restored to federal trust protection under [25 U.S.C. § 465]."[14] Sherrill Br. at 35 (quoting *Cass County*, 524 U.S. at 115, 118 S.Ct. 1904). *Cass County*, however, offers Sherrill little help. There, Congress explicitly had made land in Indian country freely alienable by providing for the "complete cession and relinquishment" of all tribal title in Minnesota. *Cass County*, 524 U.S. at 108, 118 S.Ct. 1904.

(noting that Article 2 of the treaty "specifically states that the Oneidas 'hold to themselves and their posterity forever' the 'reserved lands' "); id. at 140 (concluding that "the Treaty of Fort Schuyler cannot reasonably be understood to have divested the Oneidas of their aboriginal title"). After the federal government assumed complete control over Indian affairs with the ratification of the Constitution, the Canandaigua Treaty recognized the Oneidas' 300,000-acre reservation in federal terms, stating that it "shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." 7 Stat. 45.

[14] Section 465 of the 1934 Indian Reorganization Act allowed some of the land alienated under allotment to return to Indian hands. The section "grants the Secretary of the Interior authority to place land in trust, to be held by the federal government for the benefit of the Indians and to be exempt from state and local taxation after assuming such status." Cass County, 524 U.S. at 114, 118 S.Ct. 1904.

Afterwards, the land had been subject to federal allotment and sold to non-Indians. Because "alienability equals taxability," the Court found the land in question to be taxable. *Id.* at 109, 113, 118 S.Ct. 1904 (citing *County of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992); *Goudy v. Meath*, 203 U.S. 146, 27 S.Ct. 48, 51 L.Ed. 130 (1906)). In contrast, the Sherrill Properties are located on reservation land, a status which Congress has never changed. Since Congress has not done so, the properties did not become freely alienable and taxable simply because the OIN purchased them on the open market and currently holds them in fee simple. *See Solem v. Bartlett*, 465 U.S. 463, 471, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984) ("Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."). State and local governments may not tax reservation land "[a]bsent cession of jurisdiction or other federal statutes permitting it." *County of Yakima*, 502 U.S. at 258, 112 S.Ct. 683. Sherrill can point to neither.

Sherrill is troubled by the seeming "impossibility" that the Oneidas' free- market purchase of land within their ancient ancestral homeland could instantly render the parcels free from taxation and by the potential hardship to local municipalities and residents resulting from the Oneidas' "recreat[ion]" of "a tribal homeland." Sherrill Br. at 37. It suggests that this result is inconsistent with the conclusion of other courts that, even when a reservation has not been disestablished, Indians who no longer own parcels on the reservation cannot base claims to possessory rights on the Nonintercourse Act. *Id.* at 32-34 (citing *Oneida IIIa*; *Cayuga Indian Nation v. Cuomo*, Nos. 80-CV-930, 80-CV-960, 1999 WL 509442 (N.D.N.Y. July 1, 1999)).

But there is no inconsistency. The authorities Sherrill points to address the judicial remedies available for interference with the possessory rights of Indian plaintiffs, not the existence of those rights. In *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351, 357-59, 47 S.Ct. 142, 71 L.Ed. 294 (1926), for example, the Supreme Court held that the proper remedy for the wrongful taking of Indian land that was subsequently settled and developed was monetary damages rather than repossession by the tribe. This principle became known as the "impossibility" doctrine because it was based on the impracticability of uprooting current property owners where Indians held a valid possessory claim to land on which others had settled.

Our case is different. Recognizing the Oneidas' possessory rights in their historic reservation land, and the accompanying exemption from state taxation, does not require uprooting current property owners, because the Oneidas currently own the properties in question. Consequently, the threat from eviction present in *Oneida IIIa* and *Cayuga* is not present here. And Sherrill's argument that the removal of property from local tax rolls is a "hardship" that "upsets settled expectations" only begs the question whether the city is authorized to tax the properties.

The critical dichotomy, which Sherrill does not acknowledge, is between historic Indian title and fee ownership of the land itself. Indian or aboriginal title is the right of a tribe to use and occupy lands it has inhabited from time immemorial. *See Oneida II*, 470 U.S. at 234, 105 S.Ct. 1245. When a reservation has been disestablished, as in *Alaska* or *Cass County*, Indian title is extinguished and the only pertinent inquiry for ownership purposes is fee title. But when Indian land has been alienated in ways inconsistent with federal law, Indian title remains with the tribe. The Indian-country status of the alienated land is irrelevant for tax purposes when non-Indians hold fee title, since they pay state taxes. But when

the tribe holding Indian title reacquires former reservation land, both forms of title coexist. *Cf. United States v. Sandoval*, 231 U.S. 28, 48, 34 S.Ct. 1, 58 L.Ed. 107 (1913) (rejecting position that Indian lands held in fee simple by Pueblo cannot be Indian country). The Indian-country status of the land therefore becomes fully relevant: the state cannot tax it and the tribe can no longer legally alienate it, at least without federal approval.

At first glance, this "coexistence" of titles appears uneasy, because the validity of the Oneidas' Indian title depends on a finding that the properties were alienated in violation of the Nonintercourse Act. And if this is so, then the chain of fee simple title, of which the Oneidas are now part, is inval*id*. This unease is ultimately unwarranted, however, because the OIN's possessory rights are grounded in its unextinguished Indian title, just as they were prior to the 1805 conveyance. Acquisition of the properties, as the tribe asserts, was the least disruptive means of effectuating these possessory rights. Because the previous fee owners relinquished any claims to the land, the OIN's rights may be fully realized. Accordingly, we conclude that the OIN's purchase of the Sherrill Properties in fee simple neither rendered them freely alienable nor deprived them of their Indian-country status.

III. Effect of the Buffalo Creek Treaty on Oneida's Property Rights

Both of Sherrill's arguments for why the properties are not in Indian country rest on the claim that the land is no longer in an Indian reservation. This claim is grounded in the 1838 Buffalo Creek Treaty which, Sherrill and the *amici* contend, formally disestablished the Oneida reservation. Again, we disagree. Before returning to the text of this treaty, it is helpful to note certain basic canons of Indian treaty construction.

A. Canons of Indian Treaty Construction

Treaties are generally more closely linked to the historical events surrounding their negotiation and passage than are private agreements. They are, accordingly, "construed more liberally ..., and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32, 63 S.Ct. 672, 87 L.Ed. 877 (1943). This is particularly true with regard to Indian treaties. "'The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians [with respect to tribal lands],' and the Indians' unequal bargaining power when agreements were negotiated." *Hagen*, 510 U.S. at 423 n. 1, 114 S.Ct. 958 (Blackmun, J. dissenting) (quoting *Oneida II*, 470 U.S. at 247, 105 S.Ct. 1245). This relationship, and the notions of Indian sovereignty and self- government embodied in it, "provide[ ] an important 'backdrop' against which vague or ambiguous federal enactments must always be measured." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980) (quoting *McClanahan*, 411 U.S. at 172, 93 S.Ct. 1257 (1973)).

It is, moreover, "well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Oneida II*, 470 U.S. at 247, 105 S.Ct. 1245 (citations omitted). Any finding that Congress has abrogated Indian treaty rights is inappropriate "[a]bsent explicit statutory language." *Oneida II*, 470 U.S. at 247, 105 S.Ct. 1245 (citation and internal quotation marks omitted); *cf. Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774, 105 S.Ct. 3420, 87 L.Ed.2d 542 (1985). Congress's intention in that regard, in other words,

must be "clearly expressed."[15] *Hagen*, 510 U.S. at 423 & n. 1, 114 S.Ct. 958 (Blackmun J., dissenting).

B. Disestablishment and Diminishment Generally

The Supreme Court applied and elaborated these canons in considering issues of reservation disestablishment and diminishment most recently in the "surplus land act" cases.[16] These cases dealt with land claims arising from the allotment era and specifically addressed whether certain unallotted lands opened for settlement to non-Indians remained in Indian country. *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), for example, involved a writ of habeas corpus sought by a non-Indian who had been tried and convicted in state court for a crime committed on a Sioux reservation. The question presented was whether the state had jurisdiction over the petitioner by virtue of the Cheyenne River Act, which had authorized the Interior Secretary to allot a portion of the reservation to homesteaders. In concluding that the reservation had not been diminished, the Court set forth the standard for identifying the "clear" expressions of congressional intent needed to find diminishment. It began by noting that

[15] This canon has been applied on numerous occasions to exempt tribes from state taxation. See, e.g., Bryan v. Itasca County, 426 U.S. 373, 392-93, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976); McClanahan, 411 U.S. at 174-75, 93 S.Ct. 1257 (1973); Squire v. Capoeman, 351 U.S. 1, 6-8, 76 S.Ct. 611, 100 L.Ed. 883 (1956); Carpenter v. Shaw, 280 U.S. 363, 366-67, 50 S.Ct. 121, 74 L.Ed. 478 (1930); Choate v. Trapp, 224 U.S. 665, 675-79, 32 S.Ct. 565, 56 L.Ed. 941 (1912); The Kansas Indians, 72 U.S. (5 Wall.) 737, 760, 18 L.Ed. 667 (1866).

[16] Beginning in the late-nineteenth century, Congress passed a series so-called "surplus land acts," forcing Indians onto individual allotments carved out of reservations and opening unalloted lands to non- Indian settlers.

> only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise .... Congress *[must] clearly evince an intent to change boundaries.*

Id. at 470, 104 S.Ct. 1161 (emphasis added) (citations and internal quotation marks omitted).

Although "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests" can be helpfully probative, particularly when buttressed by fixed compensation for the opened lands, *id.*, this language is not a prerequisite for a finding of diminishment. Rather, an act's legislative history and the subsequent treatment of the land (including settlement patterns), may also suffice:

> When events surrounding the passage ...--particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress--unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged. To a lesser extent, we have also looked to events that occurred after the passage of a surplus land Act to decipher Congress' intentions. Congress' own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the

> Bureau of Indian Affairs and local judicial authorities dealt with unalloted open lands. On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred. In addition to the obvious practical advantages of acquiescing to *de facto* diminishment, we look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers.

Solem, 465 U.S. at 471-72, 104 S.Ct. 1161 (citations omitted); *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) (stating that the Court may consider " 'the historical context surrounding the passage of the surplus land Acts,' and to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there" (quoting *Hagen*, 510 U.S. at 411, 114 S.Ct. 958)).

But when these elements, considered in their totality, "fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 472, 104 S.Ct. 1161. The same analysis applies to the termination or disestablishment of a reservation. *See DeCoteau v. Dist. County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 444, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) ("[The Supreme Court] does not lightly conclude that an Indian reservation has been terminated .... '[T]he Court

> requires that the congressional determination to terminate ... be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.' ") (quoting *Mattz v. Arnett*, 412 U.S. 481, 505, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973)).

Applying these principles, the Supreme Court has found language supporting diminishment in cases where the operative portion of a surplus land act reflects an Indian agreement to "cede, sell, relinquish and convey" opened lands. *See, e.g., Yankton*, 522 U.S. at 344, 118 S.Ct. 789; *DeCoteau*, 420 U.S. at 439, 441 n. 22, 95 S.Ct. 1082; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 591 & n. 8, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). Similarly, in *Hagen v. Utah*, the operative language provided that "all the unallotted lands within said reservation *shall be restored to the public domain*," 510 U.S. at 412, 114 S.Ct. 958 (emphasis added), which the Court found indicated a congressional intent to diminish. *Id.* at 414, 114 S.Ct. 958.

In each of these cases, the Supreme Court found a textually grounded intention to diminish supported by legislative history. To varying degrees the Court also found other support such as contemporaneous congressional and administrative statements, proclamations opening the reservation to settlement, the state's assumption of jurisdiction over the opened lands, and the subsequent pattern of settlement. *See Yankton*, 522 U.S. at 351-57, 118 S.Ct. 789; *Hagen*, 510 U.S. at 416-21, 114 S.Ct. 958; *DeCoteau*, 420 U.S. at 437-49, 95 S.Ct. 1082; *Rosebud*, 430 U.S. at 592-615, 97 S.Ct. 1361.

C. The Buffalo Creek Treaty

As we have seen, Articles 1 and 2 of the Buffalo Creek Treaty summarize the central bargain between the New York Indians and the federal government: the cession of the New

York Indians' Wisconsin lands in exchange for reservation land in Kansas. Most of the remainder of the Treaty addresses the Kansas tract and various other tribe-specific arrangements. Articles 10 and 14 contain explicit cession language for the New York territory of two tribes, the Senecas and Tuscaroras. Buffalo Creek Treaty, arts. 10, 14; *see New York Indians II*, 170 U.S. at 21, 18 S.Ct. 531 (stating that the Senecas' and Tuscaroras' agreements "indicate[d] an intention on the part, both of the Government and the Indians, that they should take immediate possession of the tracts set apart for them in Kansas"). In contrast, Article 13, which addresses the Oneidas, contains no such language:

> The United States will pay [certain sums to certain Oneidas] ... for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof; and they *hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York* for the purchase of their lands at Oneida.

Buffalo Creek Treaty, art. 13 (emphases added).

Nothing in its text provides "substantial and compelling" evidence of Congress's intention to diminish or disestablish the Oneidas' New York reservation.[17] There is no specific cession language, and no fixed-sum payment for opened land

[17] Sherrill and the State rely upon Article 2 of the Treaty, asserting that the Oneidas agreed to the Kansas tract "as a permanent home for all the New York Indians, now residing in the State of New York." Buffalo Creek Treaty, Art. 2 (emphasis added). This provision, however, applies only to those Indians "who have no permanent homes." It is therefore not applicable to the OIN, who had a permanent residence in New York State. Even if it were applicable, the article does no more than Article 13 in revealing an intent by Congress or the Oneidas to disestablish their reservation in New York.

in New York; rather there is only the possibility of a sale for "uncertain future proceeds." *DeCoteau*, 420 U.S. at 448, 95 S.Ct. 1082 (describing arrangement in *Mattz*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92). Article 13 at best is ambiguous about whether removal to Kansas was required. More properly, it reflects a simple agreement to agree. While the Oneidas agreed to remove, removal was conditioned on speculative future arrangements between the Indians and a third party, New York's governor. *See New York Indians II*, 170 U.S. at 28, 18 S.Ct. 531 ("It ... appears, from the eleventh, twelfth, and thirteenth findings [of the Treaty], that the President never fixed any time for [the Indians'] removal, as was contemplated in the third article.") This contingency is reflected by the comments of Ransom Gillet, a federal Indian commissioner who participated in the Treaty negotiations and whose declaration is appended to the final document. Gillet stated that, in obtaining the Oneidas' consent to the treaty, he "most solemnly assure[d] them that the *treaty does not and is not intended to compel the Oneidas to remove from their reservation in the State of New York* .... The treaty gives them lands if they go to them and settle there but they need not go unless they wish to. When they wish to remove they can sell their lands to the Governor of the State of New York and then emigrate. But they will not be compelled to sell or remove."[18] Statement of Ransom H.

[18] Contrary to the contention of Sherrill and New York State, consideration of the Gillet declaration here is proper. See Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999). Senate amendments to the Buffalo Creek Treaty in June 1838 required a federal commissioner to explain its meaning to the tribes before it could take effect. Following Gillet's declaration to the Oneidas, the tribe assented to the treaty, and this assent--which refers to Gillet's declaration and includes his affirmation that the assent was voluntary--appear as addenda to the document as ratified. See New York Indians II, 170 U.S. at 24, 18 S.Ct. 531 ("[A] written declaration annexed to a treaty at the time of its ratification was as obligatory as if the provision had been

Gillet at Oneida Castle, Aug. 9, 1838 (emphasis added); *see also* Report of the Committee of Indian Affairs, State of New York, Mar. 24, 1847, at 4 (transcribing statement by a federal Indian commissioner to the Six Nations that they were not obligated to remove west). As it turned out, the sales to New York State were never accomplished, and the planned removal never took place. *Oneida IIIb*, 194 F.Supp.2d at 142.

Article 3 of the Treaty, moreover, contemplates that some tribes might not remove from their New York lands:

> [S]uch of the tribes of the New York Indians *as do not accept and agree to remove to the country set apart for their new homes* within five years, or such other time as the President may, from time to time, appoint, shall forfeit all interest in the lands so set apart, to the United States.

Buffalo Creek Treaty, art. 3 (emphasis added); *see New York Indians II*, 170 U.S. at 28, 18 S.Ct. 531. Accordingly, the Treaty's text contains neither an obligation to remove nor any indication of a congressional intention to disestablish the Oneidas' New York reservation.

Sherrill and the *amici* nonetheless observe that certain legislative and administrative documents, such as "representative" reports of the Commissioner of Bureau of Indian Affairs spanning the period 1890 to 1997 and a 1981 Senate Report preceding the passage of New York's Indian jurisdictional statute, 25 U.S.C. § 233,[19] demonstrate that the

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inserted in the body of the treaty itself.") (citing Doe v. Braden, 57 U.S. (16 How.) 635, 656, 14 L.Ed. 1090 (1853)).

[19] This statute gives the courts of New York civil jurisdiction in actions "between Indians" or "between one or more Indians and any other person or persons." 25 U.S.C. § 233 (2000). Notably, it also provides that nothing in it "shall be construed as

Oneidas no longer have a New York reservation. While congressional and administrative references to the reservation may bear some general relevance to congressional intent, *see Yankton*, 522 U.S. at 351, 118 S.Ct. 789, the references cited by Sherrill, the earliest of which was decided a half-century after the Treaty's proclamation, indicate little if anything about Congress's intent in 1838. Given the absence of anything in the Buffalo Creek Treaty's text or legislative history supporting disestablishment, we conclude that these later documents do not "unequivocally reveal" the intention necessary to demonstrate disestablishment.[20] *Solem*, 465 U.S. at 471, 104 S.Ct. 1161

Moreover, two enactments in the wake of the Buffalo Creek Treaty weigh against disestablishment. Under an 1842 treaty between the Oneidas and New York, certain Indians who had not migrated to Wisconsin sold a portion of their New York land (amounting to some 1100 acres) to the State. This treaty provided for the conveyance of certain lots to the State and other lots to non- removing Indians to be held as "common property." *Boylan*, 265 F. at 168 (quoting Treaty of 1842,

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subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes." Id.

[20] Most of these documents, in particular those published by the Department of the Interior and the Commissioner of Indian Affairs, appear to rely on one another. And one of them, the Department of the Interior's 1997 Annual Report on Indian land, acknowledges that thirty-two acres in Madison County is under the jurisdiction of the Bureau of Indian Affairs ("BIA"). This is, presumably, the same land we referred to as federally protected land in Boylan. 265 F. at 165-68.

Further, the fact that certain congressional documents and maps of the area, introduced by New York State on appeal, omit mention of an Oneida reservation in New York State does not conclusively indicate disestablishment. In fact, other relatively recent maps and documents, as the amici recognize, do reveal such a reservation.

arts. 1, 6). We later described this purchase as "such *portion of the reservation* as represented the equitable share in the proportion to the number of Indians who migrated." *Id.* at 167-68 (emphasis added). Finally, an 1843 enactment of the New York legislature, which sought to allow the Oneidas to hold their lands in severalty and (improperly) to alienate them by majority vote of the chiefs and head men of the tribe, makes explicit reference to "lands and property in the *Oneida reservation*." *Id.* at 169 (emphasis added) (quoting Act Relative to the Oneida Indians, Laws of the State of New York, 66th Sess., 244-46, Ch. 185, Sec. 1 (Apr. 8, 1843)).[21]

Sherrill and New York State also suggest that federal Indian removal policy, reflected in the Buffalo Creek Treaty, itself requires a finding that Congress intended to disestablish the reservation. In particular, the State argues that the "removal policy's goal of reducing conflicting state and tribal sovereignty could be accomplished only if Oneida sovereignty over the area from which the Nation was obligated to remove was terminated." New York Br. at 13. But this argument ignores both the requirement that removal language be "clearly expressed," as well as the text of the Removal Act, which permits the President to provide western lands to "such tribes or nations of Indians as may *choose* to exchange the lands where they now reside, and move there." 4 Stat. 411 (emphasis added). The State's argument also ignores the success of the Buffalo Creek Treaty in facilitating the removal of tribes other than the OIN. As the lower court found, the Treaty provided for the absolute cession of New York land for certain tribes, in particular the Senecas and Tuscaroras. The fact that certain parts of the Treaty provided for cession and other parts did not demonstrates that when

[21] Contrary to the suggestion of Madison and Oneida Counties, the fact that, under the 1843 law, individual Indians could hold the land in common, and could sell it to non-Indians under specified circumstances, does not reflect the disestablishment of the reservation.

Congress wished to disestablish a reservation, it knew what language to employ.

Sherrill and the *amici* next argue that the subsequent treatment of the reservation, in particular the pattern of its settlement and its jurisdictional history, reflects a congressional intention to disestablish. They point out that few Oneida Indians reside today in Madison and Oneida Counties, and they contend that the unabated reduction over time of the reservation's members and acreage supports *de facto* disestablishment.

At the time of the Buffalo Creek Treaty's proclamation, however, only 5000 of the original 300,000 acres remained under Oneida ownership, principally due to sales of land to the State. And, according to the *amici's* evidence, by far the largest influx of non-Indians to both Madison and Oneida Counties likewise occurred prior to 1840. Br. of *Amici Curiae* Madison County and Oneida County at 11 (table); *id.* at 2, 7 (stating that "[b]y the early nineteenth century, the area had lost its Indian character and had been settled and developed by non-Indians"). Not surprisingly, the most significant population changes occurred when the bulk of the land was alienated. *Id.* at 11. The fact that the Indian population and reservation acreage further decreased between 1840 and 1920 is not persuasive evidence that the Buffalo Creek Treaty was meant to disestablish the reservation.

In any event, subsequent settlement patterns are of limited use in demonstrating disestablishment. *Yankton Sioux*, 522 U.S. at 356, 118 S.Ct. 789 (finding demographic evidence the "least compelling" because "[e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation"); *Hagen*, 510 U.S. at 440-41, 114 S.Ct. 958 (Blackmun, J., dissenting) ("Absent

other plain and unambiguous evidence of a congressional intent, we never have relied upon contemporary demographic or jurisdictional considerations to find diminishment."). Because the Oneidas sold most of their land to the State or private parties well before the Buffalo Creek Treaty and the flood of non- Indians into the area is not clearly linked to the Treaty, the gradual reduction in the number of Oneidas living on their reservation does not reflect a clear congressional intent to disestablish it.

Finally, Sherrill contends that the continued existence of the Oneidas' reservation is incompatible with the damage award they received in *New York Indians II* as a consequence of the appropriation of their Kansas land. Recall that in *New York Indians II*, the Supreme Court found that the Buffalo Creek Treaty had effected a present grant of the Kansas lands to the OIN and that, because the land had been improperly appropriated and settled by non-Indians, the tribes were entitled to damages in the amount the government had received as the sale price. 170 U.S. at 19-21, 36, 18 S.Ct. 531. The fact that the OIN received a portion of the resulting $2 million award, Sherrill argues, evidences an "exchange" of the Oneidas' New York land for land in Kansas, which supports a finding of disestablishment.

The focus of the Buffalo Creek Treaty, however, was the exchange of *Wisconsin* land--not New York land--for that in Kansas. *See* Buffalo Creek Treaty, arts. 1, 2. The Supreme Court's decision in *New York Indians II*, as Sherrill acknowledges, reflects this bargain. *See* 170 U.S. at 2, 18 S.Ct. 531 (petition stated that "the claimants ceded and relinquished to the United States all their right, title, and interest in and to certain lands of the claimants at Green Bay, State of Wisconsin"); *id.* at 19, 29, 18 S.Ct. 531 (discussing case in terms of the "seizure and sale of the Wisconsin lands"). The divestiture by the Senecas and Tuscaroras of their New York land, as the Court pointed out, indicated

those tribes' "intention ... that they should take immediate possession of the tracts set apart for them in Kansas." *Id.* at 21, 18 S.Ct. 531. The Court said nothing about such a divestiture by the Oneidas.

Sherrill contends that the damage award "logic[ally]" incorporates the unstated conclusion that the Oneidas' New York reservation had been disestablished. Sherrill Br. at 40. This argument, for which Sherrill has provided no authority, ignores what was decided in *New York Indians II*. The exchange of Wisconsin for Kansas lands under the Treaty *itself* was the rationale for the award; the fact that some of the Oneidas' land had not been conveyed to the government was irrelevant. The few thousand acres of New York reservation land at issue appear even less significant to the award when one considers that the Treaty included a 65,000-acre carve-out in Wisconsin so the Oneidas could maintain a reservation there. Buffalo Creek Treaty, art. 1.[22]

Construing the Buffalo Creek Treaty liberally and resolving, as we must, all ambiguities in the Oneidas' favor, we conclude that neither its text nor the circumstances surrounding its passage and implementation establish a clear congressional purpose to disestablish or diminish the OIN reservation.

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[22] The case against disestablishment is further supported by the text of Article 3, which preserves Indian title to the Kansas lands (by preventing forfeiture of such title) as long as the tribe has agreed to remove; there is no divestiture requirement or other exchange. The Supreme Court in New York Indians II pointed out that the Oneidas had met the condition to avoid forfeiture merely by their agreement to remove. 170 U.S. at 26, 18 S.Ct. 531. Contrary to the State's suggestion, the Oneidas' agreement to remove is distinguishable from an agreement to cede their reservation; the latter could have occurred as a result of the former, but it never did because the applicable conditions were not satisfied.

IV. Continuous Tribal Existence

Sherrill further argues that there are, at a minimum, "disputed issues of fact" as to whether the OIN has maintained its tribal existence so as to be entitled to claim the properties as reservation land. It argues that the fact that the OIN is a currently recognized tribe is irrelevant, because as a practical matter it has not existed continuously over the last century. In support of this argument, Sherrill chronicles the gradual reduction in population of the OIN, pointing to statistics reflecting the non-Indian influx to Madison and Oneida Counties. Any lapse in tribal identity, Sherrill concludes, rendered the OIN's land freely alienable and precludes the tribe from asserting rights in its historic reservation land. Such a determination would, in turn, defeat the OIN's claims to tax exemption.

Sherrill's argument assumes that a tribe's land loses its reservation status in the event of a temporary lapse of tribal organization or identity. We find, however, no requirement in the law that a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land. Indeed, the Supreme Court held in *United States v. John* that a Mississippi resident of Choctaw Indian blood was properly under federal jurisdiction when he committed a crime on Choctaw land which had been designated a reservation, even though the tribe was "merely a remnant of a larger group of Indians, long ago removed ... [and] federal supervision over them has not been continuous." 437 U.S. 634, 653, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978).

The authority upon which Sherrill relies, which concerns the Nonintercourse Act, does not indicate otherwise.[23] In *Golden*

[23] Nor do any of the authorities listed by the dissent. It is true that some groups of Indians claiming tribal status, which were not federally recognized tribes, have been required to demonstrate "continuous tribal existence" in order to establish standing under the Nonintercourse Act. See Oneida IIIb, 194 F.Supp.2d at 121 n. 11 (citing Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.1979) (Mashpee I), and Canadian St. Regis Band of Mohawk Indians v. State of N.Y., 146 F.Supp.2d 170, 184 (N.D.N.Y.2001)). But Sherrill and Madison have challenged neither the OIN's standing nor its current tribal status. In other cases, when relevant, courts have quite logically noted that tribes can only recover under the Nonintercourse Act if they "were tribes at the time the land was alienated." Mashpee Tribe v. Secretary of the Interior, 820 F.2d 480, 482 (1st Cir.1987) (Mashpee II). But there is no question that the OIN was a tribe and in a trust relationship with the federal government at the time of the conveyances at issue. Neither the dissent nor Sherrill has identified any authority for the proposition that to sustain a claim under the Nonintercourse Act a federally recognized Indian tribe must demonstrate that its tribal structure remained intact continuously after unlawful conveyances of tribal land.

Hill Paugussett Tribe v. Weicker, 39 F.3d 51, 56 (2d Cir.1994), we stated that, in order to make a prima facie case based on a violation of the Act, a group claiming to be an Indian tribe must establish that: "(1) it is an Indian tribe, (2) the land [claimed to have been alienated in violation of the Act] is tribal land, (3) the United States has never consented to or approved the alienation of this tribal land, and (4) the trust relationship between the United States and the tribe has not been terminated or abandoned." All four elements are satisfied here. It is undisputed that the OIN is federally recognized and the Bureau of Indian Affairs exercises jurisdiction over, at a minimum, a thirty-two acre parcel of land within Madison County, which formed part of the OIN's historic reservation. This reservation has never been disestablished, and accordingly, the "trust relationship" between the federal government and the Oneidas has never been terminated. Nor have the Oneidas ever voluntarily abandoned this trust relationship by "choos[ing] to terminate tribal existence." *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 587 (1st Cir.1979) (Mashpee I).[24] Finally, the

federal government never approved the alienation of the land at issue.

Moreover, contrary to Sherrill's contentions, even if continuous tribal existence were required, the record before us shows it. Once a tribe has been recognized, the removal of that recognition, like reservation diminishment or disestablishment, is a question for other branches of government, not the courts. *See United States v. Holliday*, 70 U.S. (3 Wall) 407, 419, 18 L.Ed. 182 (1865) ("In reference to all matters [of tribal organization], it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs."); *see also Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480, 484 (1st Cir.1987) (*Mashpee II*) (same). The OIN is a federally recognized tribe that is a direct descendant of the original Oneida Indian Nation. *Oneida II*, 470 U.S. at 230, 105 S.Ct. 1245; *Oneida IIIb*, 194 F.Supp.2d at 119. And Sherrill has identified no legislative or executive action withdrawing recognition.

Rather, the authorities offered by Sherrill merely reflect the opinions of a handful of government officials and commentators, at various points in the last century, that Oneida tribal relations had ceased.[25] In particular, letters

[24] Sherrill, citing Mashpee II, argues that a temporary lapse of tribal status, however involuntary or unintended, causes "Non-Intercourse Act coverage [to] terminate[ ]." Sherrill Br. at 44. But Mashpee I makes clear that an "involuntary process of assimilation" is insufficient to constitute abandonment of tribal status, which can only occur voluntarily and willingly. See Mashpee I, 592 F.2d at 587. This requirement underscores the fact that a temporary lapse of tribal organization is insufficient to sever the trust relationship between a federally recognized tribe and the federal government. See The Kansas Indians, 72 U.S. at 757, 72 U.S. 737.

[25] These authorities also include a decision of the Northern District of New York, United States v. Elm, 25 F.Cas. 1006,

from the Assistant Commissioner of Indian Affairs in 1916 and 1925 stated that the tribe no longer existed in New York.[26] This conclusion is, to some degree, understandable, since most of the Oneida reservation land had been sold to the State, with the remaining parcels divided among members who, increasingly, lived separately from one another and received state services. *See Boylan*, 265 F. at 167-70. But these informal conclusions are ultimately irrelevant because they do not supply the necessary federal action withdrawing the tribe from government protection we held was required in *Boylan*. *Id.* at 171. Moreover, this Court determined in *Boylan* in 1920--between the time of the two letters in question--that the Oneida tribe did in fact exist. *Id.* at 171-72.

Because the Oneidas' reservation was not disestablished and because the Sherrill Properties are located within that reservation, we conclude that Sherrill can neither tax the land nor evict the Oneidas. Accordingly, we: (i) affirm the denial of Sherrill's motion for summary judgment or for a preliminary injunction based on its counterclaims in the Lead case; and (ii) affirm the grant of the OIN's cross-motion for summary judgment on its taxation claim and Sherrill's counterclaims[27] in the Lead case and its cross- motion for summary judgment in the Eviction case.

1008 (N.D.N.Y.1877), stating that since 1838, the Oneidas' "tribal government ha[d] ceased as to those who remained in this state." However, the decision also suggests continued tribal status, as the Oneidas "continued to designate one of their number as chief," albeit for certain financial tasks, and states that there are "20 families which constitute the remnant of the Oneidas resid[ing] in the vicinity of their original reservation ... their dwellings ... interspersed with the habitations of the whites." Id.

[26] Felix Cohen, whom Sherrill also cites, relies on the same source as the 1916 letter, a 1915 memorandum by a lawyer in the Office of Indian Affairs. Cohen at 416-17 n.6 (1942).

V. Sherrill's Rule 56(f) Motion

Sherrill and the State of New York contend, in the alternative, that the District Court prematurely decided the OIN's cross-motions for summary judgment without affording Sherrill an adequate opportunity to conduct discovery on certain critical matters, in particular: (i) whether the Sherrill Properties are located within the boundaries of the reservation recognized by the Canandaigua Treaty; (ii) whether Congress modified the Canandaigua Treaty via the Buffalo Creek Treaty or otherwise; (iii) the Oneidas' continuous tribal existence; (iv) whether the properties were encompassed by the 1805 and 1807 land transfers; and (v) whether those transfers violated the Nonintercourse Act.

Federal Rule of Civil Procedure 56(f) provides an opportunity to postpone consideration of a motion for summary judgment and to obtain additional discovery by describing: (i) the information sought and how it will be obtained; (ii) how it is reasonably expected to raise a genuine issue of material fact; (iii) prior efforts to obtain the information; and (iv) why those efforts were unsuccessful. *Sage Realty Corp. v. Ins. Co. of N. Am.*, 34 F.3d 124, 128 (2d Cir.1994). The District Court denied Sherrill's motion principally because Sherrill failed to explain why it was unable to obtain the discovery sought, much of which was a

[27] We also agree with the lower court's conclusion that Sherrill's counterclaims were improper because the tribe is immune from suit in federal court. See Oneida IV, 145 F.Supp.2d at 258-59; see Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (stating that suits and cross-suits against Indian tribes are barred by tribal sovereign immunity absent a clear waiver by the tribe or congressional abrogation) (citing United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 511-13, 60 S.Ct. 653, 84 L.Ed. 894 (1940)).

matter of public record, before the close of briefing. The court also noted that Sherrill had failed to identify the information sought with particularity. We review a lower court's denial of a Rule 56(f) motion for abuse of discretion. *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir.1994).

Sherrill's Rule 56(f) affidavit is simply a list of issues on which it desires more information. No specific facts or documents are requested, and Sherrill fails to indicate how any of the information sought could be expected to create genuine factual issues. Sherrill, moreover, has had a sufficient opportunity to develop and contest the issues on which it now claims to need additional discovery. Sherrill, like the *amici*, has submitted voluminous evidence in support of its position on disestablishment, tribal existence, and the Nonintercourse Act, evidence which the District Court fully considered. Sherrill was the first party to move for summary judgment--five months into discovery--on the issue of the OIN's tax liability. Under these circumstances, we conclude that the District Court did not abuse its discretion in denying the motion.

VI. Sherriil's Motion for Leave to Amend

In the Lead case, Sherrill moved for leave to amend its answer to add the affirmative defenses of statute of limitations, laches, waiver, estoppel, *in pari delicto*, and ratification, all of which the lower court denied on futility grounds. *Oneida IV*, 145 F.Supp.2d at 259-60. On appeal, Sherrill contends that the District Court improperly denied it the opportunity to advance these defenses. We disagree.

We review the denial of a motion for leave to amend for abuse of discretion. *Jones v. N.Y. State Div. of Military & Naval Affairs*, 166 F.3d 45, 49 (2d Cir.1999). Where, as here, the denial was based on an interpretation of law, we

review that legal conclusion de novo. *Id.* While leave to amend a pleading shall be freely granted when justice so requires, Fed.R.Civ.P. 15(a), amendment is not warranted in the case of, among other things, "futility." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). A proposed amendment to a pleading would be futile if it could not withstand a motion to dismiss pursuant to Rule 12(b)*(*6). *Ricciuti v. N.Y.C. Transit Auth.*, 941 F.2d 119, 123 (2d Cir.1991).

We agree with the lower court that Sherrill's proposed defenses would not survive such a motion. We find the *in pari delicto* and ratification defenses insufficient. *Oneida IV*, 145 F.Supp.2d at 260. Addressing delay- based arguments in *Oneida II*, the Supreme Court held that no federal limitations period applied and that it would be improvident to apply a parallel state requirement in this uniquely federal context. 470 U.S. at 240-44, 470 U.S. 226. As the Court pointed out, there is no time-bar for claims brought by the United States on behalf of Indians "to establish title to, or right of possession of, real or personal property." *Id.* at 241-43 & n. 15, 105 S.Ct. 1245. The *Oneida II* majority also strongly suggested that a laches defense is improper for similar reasons. *Id.* at 244-45 & n. 16, 105 S.Ct. 1245 ("[T]he application of laches would appear to be inconsistent with established federal policy.") (citing *Ewert v. Bluejacket*, 259 U.S. 129, 137-38, 42 S.Ct. 442, 66 L.Ed. 858 (1922) (doctrine of laches cannot bar a suit by individual Indians challenging land transactions for violating federal statutory restrictions on alienation)).

We likewise have found--in ruling on the merits of a defense in an action involving an Oneida land claim--that time-bars are inconsistent with established federal policy, because "to permit a state to enact and invoke a time-bar would in effect allow a state to terminate the relationship of trust and guardianship between the United States and the Oneidas ...

[which] may only be terminated by federal law." *Oneida Indian Nation of N.Y. v. New York*, 691 F.2d 1070, 1084 (2d Cir.1982); *see also Oneida Indian Nation of N.Y. v. New York*, 860 F.2d 1145 (2d Cir.1988) (accepting rejection of laches defense as law of the case). The result would be the same regardless of whether the laches defense were asserted under federal or state law. *Oneida Indian Nation*, 691 F.2d at 1084.

In asserting its waiver and estoppel defenses, Sherrill contends that the OIN's claim to aboriginal title in the properties is inconsistent with its open-market purchases. As discussed, there is, however, no inconsistency; Indian title and fee simple ownership of reservation land are distinct. We see no reason why a tribe holding both fee simple title and Indian title in a property should be prevented from suing based on the latter. Accordingly, we agree with the lower court's conclusion that Sherrill's proposed amendment to its answer in the Lead case was futile.

VII. Motion to Dismiss the Members Case

In the Members case, Sherrill contends that the OIN's officers violated state law by failing to pay property taxes and collect state sales taxes on the Sherrill Properties. Its claims against the officers with regard to property taxes are insufficient for the same reason its counterclaims against the tribe are insufficient: the parcels are not taxable. Sherrill itself acknowledged the possibility of this result in its brief on appeal. See Sherrill Br. at 59 ("If ... this Court reverses the finding of Indian country ... then the pleading in the Members Case is sufficient ....").

Sherrill seeks damages for unjust enrichment arising out of the officers' alleged non-payment of state sales taxes, in particular for goods sold to non-Indians. Compl., Members Case, ¶¶ 25-27, 41-45. While individual tribal officers may

be liable for nonpayment of state sales taxes where they act outside the authority of the tribe, *see Potawatomi*, 498 U.S. at 514, 111 S.Ct. 905 (citing *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 355, 358-59 (2d Cir.2000), there is no allegation that the OIN's officers--whom Sherrill sued in their official capacities--did so here. Consequently, Sherrill's claim for damages against the OIN's officers is no different from a claim against the tribe itself for non-payment of sales taxes. Accordingly, since the District Court correctly concluded that these officers were immune from suit on the claims related to collection of sales taxes, we affirm the dismissal of the Members case.[28]

VIII. Motions in the Related Case

Madison appeals from (i) the District Court's denial of its motion to dismiss pursuant to Federal Rule of Civil Procedure 19 for failure to add the Wisconsin and Thames Oneidas as plaintiffs in the Related case; and (ii) the District Court's *sua sponte* award of judgment on the pleadings to the OIN. *See Oneida IV*, 145 F.Supp.2d at 264; *Oneida Indian Nation of N.Y. v. Madison County*, 145 F.Supp.2d 268 (N.D.N.Y. 2001).

A. Rule 19

Reviewing for abuse of discretion, *Viacom Int'l, Inc. v. Kearney*, 212 F.3d 721, 725 (2d Cir.2000), we affirm the lower court's determination that the Wisconsin and Thames Oneidas were not necessary (and hence not indispensable) parties. Federal Rule of Civil Procedure 19(a) provides:

[28] We need not address the additional ground upon which the District Court found the Members case insufficient, namely, that Sherrill failed to add the OIN as a necessary and indispensable party. See Oneida IV, 145 F.Supp.2d at 263-64.

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Should a district court determine that a non-party is necessary but is not able to join him, Rule 19(b) requires it to consider, among other things, "to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties," in determining whether the action must be dismissed.

Madison contends that the Wisconsin and Thames Oneidas are necessary and indispensable parties in the Related case because of their involvement in other land claim litigation currently pending in the Northern District of New York. *See supra* Part II; *Oneida IIIa*, 199 F.R.D. 61; *Oneida IIIb*, 194 F. Supp.2d 104. The parties whose interests Madison contends require protection, however, deny they require it. On the contrary, the Wisconsin and Thames Oneidas insist that their interests are aligned with, and adequately protected by, the OIN and they will not be prejudiced if they are not joined. See 6/15/00 Aff. of Arlinda Locklear; 6/23/00 Aff. of Carey R. Ramos (submitted in 00-CV-506). Moreover, the OIN can obtain the requested declaratory and injunctive relief without the other branches as parties. Accordingly, the District Court did not abuse its discretion in determining that

the Wisconsin and Thames Oneidas are not necessary, and hence not indispensable, parties. *See ConnTech Dev. v. Univ. of Conn. Ed. Props., Inc.*, 102 F.3d 677, 682 (2d Cir.1996).

B. Judgment on the Pleadings

In awarding judgment on the pleadings in the Related case to the OIN, the District Court determined that:

> [a]ll the facts in the Lead Case likewise apply in this case. Moreover, as Madison County appeared as amicus curiae in the Lead Case, it had a full opportunity to be heard on the taxation issue. Accordingly, based upon the foregoing determination that the properties at issue are Indian Country and therefore not taxable, the Nation is entitled to judgment on the pleadings.

Oneida *IV*, 145 F.Supp.2d at 264.

We believe that this *sua sponte* dismissal of the Related case "on the pleadings" was procedurally improper. Under Federal Rule of Civil Procedure 12(c), a party may move for judgment on the pleadings only "[a]fter the pleadings are closed." Although Madison had moved to dismiss the complaint under Rule 19(a) for failure to join necessary and indispensable parties, it has not answered the complaint. Madison contends that, if it had an opportunity to answer, it would raise defenses distinct from those of Sherrill--although it neglects to articulate those defenses. Further, the sole ground the court provided for its decision to dismiss the case was that "[a]ll the facts in the Lead Case apply in this case." Different parcels, however, are at issue. And although there is some evidence in the record indicating that the Madison properties were part of the Oneidas' historical reservation, this evidence is meager. It may well be that the lower court's instincts on the merits of Madison's claims are correct. But rather than attempt to decide the issue based on an

incomplete record, we vacate this portion of the judgment and remand for further proceedings.

CONCLUSION

For the foregoing reasons, we affirm: (i) the denial of Sherrill's motion for summary judgment or, in the alternative, for a preliminary injunction based on its counterclaims in the Lead case; (ii) the denial of Sherrill's motion for leave to amend its answer in the Lead case; (iii) the denial of Sherrill's Rule 56(f) motion; (iv) the grant of the OIN's cross- motion for summary judgment in the Lead and Eviction cases; and (v) the grant of the OIN's officers' motion to dismiss the Members case. We vacate the dismissal of the Related case and remand for further proceedings consistent with this opinion.

VAN GRAAFEILAND, Senior Circuit Judge, dissenting.

I agree with my colleagues that the district court erred in granting judgment on the pleadings against Madison county. However, I disagree with their affirmance of summary judgment against Sherrill in the lead case. Accordingly, I dissent with respect to the court's holdings against Sherrill.

In the first paragraph of the majority opinion, we are instructed not to confuse the Oneida Indian Nation of New York, identified in the opinion by the terms "OIN" or "the Oneidas" with the Oneida Indian Nation, "which is not a federally recognized tribe and is not a party to these consolidated cases." The opinion then continues: "The Oneidas lived on what became central New York State long before the founding of the United States." Despite my colleague's admonishment, I assume that Judge Parker uses the word "Oneidas" here to mean the race as a whole, not the Oneida Indian Nation of New York. I see nothing in the record to indicate that the Oneida Indian Nation of New

York, which, after all, could not have been in existence before its namesake state, has existed from time immemorial. Although some courts apparently have accepted that aboriginal rights can be inherited somehow by a successor tribe that has no aboriginal rights of its own, I am not persuaded. Moreover, even assuming that aboriginal rights are heritable, I believe that there exists a substantial question as to whether any such rights inherited by the Oneida Indian Nation of New York were forfeited because its tribal existence was abandoned for a discernable period of time.

Rather than add another hundred-page opinion to the quagmire that presently exists in this area, I simply offer the following statements from what I believe are authoritative sources:

> •"The right of Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy.... The possession, when abandoned by the Indians, attaches itself to the fee without further grant." *U.S. v. Cook*, 19 Wall. 591, 86 U.S. 591, 593, 22 L.Ed. 210 (1873).
>
> •"We think it entirely clear that this treaty did not convey a fee simple title to the Indians; that under it no tribe could claim more than a right to continued occupancy; and that when this was abandoned all legal right or interest which both tribe and its members had in the territory came to and end." *Williams v. City of Chicago*, 242 U.S. 434, 437-38, 37 S.Ct. 142, 61 L.Ed. 414 (1917).
>
> •"To establish a *prima facie* case based on a violation of the [Nonintercourse] Act, a plaintiff must show that ... the trust relationship between the United States and the tribe has not been terminated or abandoned."

Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 56 (2d Cir.1994) (emphasis added).

> •"Certainly individual Indians or portions of tribes may choose to give up tribal status.... If all or nearly all members of a tribe chose to abandon the tribe, then, it follows, the tribe would disappear." *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 587 (1st Cir.1979) (citations omitted).
>
> •"By the treaty the Osages ceded and relinquished to the United States all of that reservation, and in consideration therefor the United States reserved, set apart, what later was known as the Kansas Reservation in which the Indians were given only the right of occupancy so long as they might choose to remain; and as already said they later chose to go elsewhere, which is a surrender and abandonment of the only right given to them by the treaty." *Shore v. Shell Petroleum Corp.*, 60 F.2d 1, 3 (10th Cir.1932).
>
> •"Indian tribes, in the absence of a treaty reservation, have only an occupancy and use title, or right, the fee being in the United States, and when an Indian tribe ceases for any reason, by reduction of population or otherwise, to actually and exclusively occupy and use an area of land clearly established by clear and adequate proof, such land becomes the exclusive property of the United States as public lands, and the Indians lose their right to claim and assert full beneficial interest and ownership to such land[.]" *Quapaw Tribe of Indians v. U.S*, 128 Ct.Cl. 45, 120 F.Supp. 283, 286 (1954).
>
> •"Since original Indian title is dependent upon proof of actual, continuous, and exclusive possession, proof of voluntary abandonment of an area by a tribe constitutes

a defense to the aboriginal claim." Cohen Felix S., Federal Indian Law, Ch. 9, Sec. A2a (1982).

•"The right of occupancy and possession is lost by abandonment, and possession, when abandoned by the Indians, attaches itself to the fee without further grant." 42 C.J.S. *Indians* § 70 (1991).

The majority claims that the historical records offered by Sherrill to show that the Oneidas cannot establish continuous tribal existence "merely reflect the opinions of a handful of government officials and commentators[.]" My colleagues' attempts to minimize the significant evidence of tribal dissolution in the record are misleading. Sherrill cites numerous persuasive authorities, most notably contemporaneous reports by both the Commissioner of Indian Affairs and the Department of the Interior, in support of its argument that the tribe ceased to function for a period of time:

•"[The Oneida] tribal government has ceased as to those who remained in [New York] state.... [The designated chief's] sole authority consists in representing them in the receipt of an annuity .... They do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they are identified with the rest of the population." *U.S. v. Elm*, 25 F. Cas. 1006, 1008 (N.D.N.Y.1877).

•"The Oneida Indians have no reservation.... [The few Oneidas that remain] are capable and thrifty farmers, and travelers passing through the county are unable to distinguish in point of cultivation the Indian farms from those of the whites. The Oneida have no tribal relations, and are without chiefs or other officers."

1891 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior. (JA 1229).

•The 1892 Census map of New York depicts no Oneida reservation. (JA 995).

•"The Oneidas have no reservation. Most of that tribe removed to Wisconsin in 1846. The few who remained retained 350 acres of land in Oneida and Madison counties, near the village of Oneida. This land was divided in severalty among them and they were made citizens." *1893 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior*. (JA 1231).

•"The Cayuga and Oneida have no reservations. A few families of the latter reside among the whites in Oneida and Madison counties in the vicinity of the Oneida Reservation which was sold and broken up in 1846, when most of the Oneida removed to Wisconsin. What lands they have they own in fee simple, and the Oneida here are voters in the white elections. A considerable number of the Oneida live on the Onondaga Reservation." *1900 Annual Reports of the Department of the Interior*. (JA 1234).

•"The Oneida have no reservation. Most of the tribe removed to Wisconsin in 1846. A few families are still living in Oneida and Madison counties, near the old Oneida Reservation and near the village of that name. They are citizens of New York and are entitled to vote at white elections.... At one time they owned several hundred acres of land, which they held in severalty, but they have sold most of it, and now have only a few small and scattered pieces." *1901 Annual Reports of the Department of the Interior*. (JA 1238-39).

> •"The New York Oneida have no reservation: in fact can hardly be said to maintain a tribal existence. About 100 of them have 'squatted' on the Onondaga Reserve: so many of these have intermarried with the Onondaga as to preclude any probability of their removal.... About 120 of them are carried on the agency rolls as 'Oneidas at Oneida' which is somewhat misleading, as in reality this roll is made up of scattered families residing in Oneida, Madison, Livingston, Genesee, Herkimer, and other counties of the State." *1906 Annual Reports of the Department of the Interior*. (JA 1241).

Ironically, after dismissing these federal authorities out of hand, the majority argues that recognition of the Oneida Indian Nation of New York by the Bureau of Indian Affairs, which is merely the modem day corollary to the Department of the Interior offices responsible for most of the above-cited reports, must end our inquiry into the tribe's continuous tribal existence. I disagree. Our court, in *Golden Hill*, observed that "tribal status for purposes of obtaining federal benefits is not necessarily the same as tribal status under the Nonintercourse Act." *Id.* at 57. We further stated that, "[r]egardless of whether the BIA were to acknowledge Golden Hill as a tribe for purposes of federal benefits, Golden Hill must still turn to the district court for an ultimate judicial determination of its claim under the Nonintercourse Act." *Id.* at 58. "The two standards overlap, though their application might not always yield identical results." *Id.* at 59.

Moreover, the degree of deference we owe to BIA recognition in this case ought to be carefully measured, not only because prior reports by the Department of the Interior cast doubt on the continual existence of the New York Oneidas, but also because BIA recognition was granted to the Oneida Indian Nation of New York prior to the BIA's creation of the comprehensive regulations set forth in 25

C.F.R. Part 83 in 1978. In describing the BIA tribal recognition process prior to the passage of these regulations, the First Circuit has stated that the BIA "has not historically spent much effort in deciding whether particular groups of people are Indian tribes. By and large no one has disputed the tribal status of Indians with whom the [BIA] has dealt." *Mashpee*, 592 F.2d at 581. It seems unlikely that the Oneida Indian Nation of New York volunteered to the BIA any evidence that would have weakened its tribal recognition claim, especially when one considers that they apparently were unresponsive to Sherrill's discovery requests on this issue during litigation. Our court ought not to accept reflexively BIA recognition as dispositive of continuous tribal existence when that recognition was granted before the Bureau had adopted its comprehensive criteria and when the record contains such compelling evidence of a period of tribal dissolution.

The majority also contends that the issue of the Oneida's tribal existence was satisfactorily resolved by our court in *Boylan*. However, *Boylan* was decided nearly six years before the Supreme Court enunciated in *U.S. v. Candelaria*, 271 U.S. 432, 442, 46 S.Ct. 561, 70 L.Ed. 1023 (1926), the requirements for establishing tribal existence under the Nonintercourse Act. Following *Candelaria*, an Indian group seeking to prove tribal existence was required to show that it was "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Id.* (citation omitted); *see also Golden Hill*, 39 F.3d at 59. It is far from clear that the Boylan majority would have reached the same conclusion under the *Candelaria* criteria.

With all of the foregoing as background, we now come to the question that constitutes the heart of this appeal: viz. do my colleagues err in granting summary judgment in favor of the

tribe? I believe that the question must be answered in the affirmative. The standard for summary judgment bears repeating. The burden is on the moving party to establish that there exists no genuine issue as to any material fact. *See Opals On Ice Lingerie v. Body Lines Inc.*, 320 F.3d 362, 367 (2d Cir.2003); *Burtnieks v. City of New York*, 716 F.2d 982, 985 (2d Cir.1983); *First National Bank of Cincinnati v. Pepper*, 454 F.2d 626 (2d Cir.1972). All evidentiary material submitted must be viewed in the light most favorable to, and all inferences must be drawn in favor of, the non-moving party. *See United States v. Diebold*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); *Opals on Ice*, 320 F.3d at 367; *Burtnieks*, 716 F.2d at 985. Bearing in mind the deference that we owe Sherrill under these standards, summary judgment clearly should not be granted to the plaintiff. The record presents significant, unresolved questions of fact as to whether the Oneida Indian Nation of New York has been in existence continuously over the last century and a half.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK
DECIDED JUNE 4, 2001

United States District Court
N.D. New York

ONEIDA INDIAN NATION OF NEW YORK, Plaintiff,
v.

THE CITY OF SHERRILL, NEW YORK, Defendant.

The State of New York, Amicus Curiae,
Madison County, Amicus Curiae,
Oneida County, Amicus Curiae,
Oneida Ltd., Amicus Curiae.
The City of Sherrill, New York, Plaintiff,
v.
Oneida Indian Nation of New York, Defendant.

The City of Sherrill, New York, Plaintiff,
v.
Ray Halbritter; Keller George; Chuck Fougnier; Brian Patterson; Marilyn John; Clint Hill; Dale Rood; Dick Lynch; Ken Phillips; Iva Rodgers; Beulah Green; Ruth Burr, Defendants.

Oneida Indian Nation of New York, Plaintiff,
v.
Madison County, Defendant.

Nos. 5:00-CV-223 (Lead Case), 5:00-CV-327 (Eviction Case), 5:00-CV-1106 (Member Case), 5:00-CV-506 (Related Case).

June 4, 2001

HURD, District Judge.

MEMORANDUM-DECISION and ORDER

"This litigation makes abundantly clear the necessity for congressional action."

So said the United States Supreme Court in 1985 in reference to the Oneida Indian Nation land claim. *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 253, 105 S.Ct. 1245, 1261, 84 L.Ed.2d 169 (1985) (emphasis added) [hereinafter "*Oneida II*"].

Rather than heed the advice of our highest Court, Congress has not enacted legislation to extinguish or resolve Indian title and land claims in New York State. It has turned a deaf ear to the Court and remained silent for over sixteen (16) years.

Further, heroic efforts over many years on the part of Senior District Judge Neal P. McCurn and Settlement Master Ronald J. Riccio to achieve a global settlement of the Oneida Indian Nation claims were met with resistance and ultimate failure. *See Oneida Indian Nation v. County of Oneida*, 199 F.R.D. 61, 66 (N.D.N.Y.2000). A political resolution by legislation or agreement has apparently been rejected by Federal, State, and Local governments and by the Oneida Indian Nation. *See id.* at 66.

Instead, the parties have increasingly turned to the courts to settle their disputes. These cases are examples. Unlike the executive and legislative branches of government, the judiciary cannot turn a deaf ear in the face of disputes such as these. Rather, a judge must put aside any personal opinions

or ideas and apply the Constitution, Treaties, and laws of this great country. This is the result.

I. *INTRODUCTION*

The Oneida Indian Nation of New York ("the Nation" or "the Oneidas") filed a complaint on February 4, 2000, in the lead case, 00-CV-223, pursuant to 28 U.S.C. § 1331, seeking to prevent attempts by the City of Sherrill, New York ("Sherrill") to enforce property tax laws against properties owned by the Nation [hereinafter "Lead Case"]. Sherrill moved for summary judgment, or, in the alternative, for a preliminary injunction. The Nation opposed Sherrill's motion and cross-moved for summary judgment. Additionally, Sherrill has moved for permission to amend its answer to add certain affirmative defenses. The Nation opposes the motion to amend.

On February 22, 2000, the Nation removed to this court, pursuant to 28 U.S.C. § 1441, a petition for eviction filed by Sherrill in New York State Supreme Court, Oneida County, on February 15, 2000 [hereinafter "Eviction Case"]. In the Eviction Case, 00-CV-327, Sherrill sought to evict the Nation from the properties that are the subject of the Nation's February 4, 2000, complaint. Therefore, the Eviction Case was consolidated with the Lead Case on June 14, 2000.

Sherrill filed a complaint on July 17, 2000, pursuant to 28 U.S.C. § 1362, seeking declaratory relief and damages from individually named representatives of the Nation's Men's Council and Clan Mothers relating to the taxation of the properties at issue in the two aforementioned actions [hereinafter "Member Case"]. An amended complaint was filed as of right on August 7, 2000. The Member Case, 00-CV-1106, was thereafter consolidated with the Lead and Eviction Cases. The individually named Nation representatives, Ray Halbritter, Keller George, Chuck

Fougnier, Brian Patterson, Marilyn John, Clint Hill, Dale Rood, Dick Lynch, Ken Phillips, Iva Rodgers, Beulah Green, and Ruth Burr (collectively "Nation representatives") moved to stay this action and to dismiss. Sherrill opposed the motion.

On November 13, 2000, Madison County and Oneida County ("the Counties"), New York State, and Oneida Ltd. filed, with permission, briefs as amici curiae in support of Sherrill's motion for summary judgment or alternatively for injunctive relief and in opposition to the Nation's motion for summary judgment. The Nation did not object to the filing of the amici curiae briefs, but did submit a responsive brief.

Also currently pending is a related case, 00-CV-506, filed by the Nation pursuant to 28 U.S.C. § 1331, against Madison County seeking to prevent enforcement of the County's property tax laws [hereinafter "Related Case"]. A motion to dismiss is pending in that action.

Oral argument was heard regarding all motions on March 9, 2001, in Utica, New York. Decision was reserved.

II. *FACTS*

A. *City of Sherrill Properties*

In 1997 and 1998 the Nation purchased, in open market transactions, fee simple title to certain parcels of land within the municipality of Sherrill. These parcels are designated by Sherrill as 322.014-1-23, 322.014-1-24, 322.014-1-25, 322.014-1-26, 322.015-2-1, 322.015-2-64, 322.015-2-65, 322.015-2-40.3, 322.015- 2-45.1, 322.015-2-47. The Nation operates a gasoline filling station with convenience store and a textile manufacturing and distribution facility on the properties. Sherrill assessed property taxes against these parcels. The Nation did not pay the assessed taxes, asserting

that the properties are contained within the Oneida Indian Reservation ("the Reservation") and therefore are nontaxable by state municipalities.

The Nation has a Silver Covenant Chain Grant program under which it makes ad valorem grants to schools and municipalities in which repossessed aboriginal lands are located. In order to participate in this program the municipality must remove such lands from its tax rolls pending resolution of the Nation's land claims. Sherrill and Madison County have not participated in the Nation's Silver Covenant Chain Grant program.

On August 7, 1997, Sherrill sent the Nation notices of tax delinquency. (Carmen Aff. sworn Sept. 11, 2000, Ex. 17 [hereinafter "First Carmen Aff."].) One notice set forth a total delinquency of $2,239.23, including overdue tax, penalties, and interest. A second and third notice each set forth a total delinquency of $22.59, including overdue tax, penalties, and interest. Thus, the total delinquency at that time was $2,284.71. None of the three notices identified a parcel or parcels. The notices each warned, "If you do not wish to have your name and property advertised for tax sale, payment of the unpaid taxes must be received by September 2, 1997." *Id.* In keeping with its assertion that the properties were nontaxable Reservation land, the Nation did not respond to the notices.

In September and October 1997 Sherrill advertised, in a local newspaper, that three Nation parcels would be sold for 1997 unpaid taxes on November 5, 1997. These parcels were identified as 322.014-1-26, 322.014-1-23, and 322.014-1-25. Sherrill did not serve the Nation with notice of the tax sale. The tax sale was held on that date and Sherrill purchased the properties. Pursuant to the Sherrill City Charter, a property owner may redeem a property sold at tax sale within two years of the sale. In November 1999 Sherrill published a

notice in a local newspaper that the redemption period for the three parcels would expire on February 8, 2000. On January 10, 2000, Sherrill personally served notice on the Nation that the expiration period to redeem the properties was February 8, 2000. On February 9, 2000, Sherrill recorded deeds for the properties. On February 17, 2000, Sherrill initiated eviction proceedings in New York State Supreme Court, Oneida County.

Meanwhile, Sherrill assessed property taxes and initiated enforcement proceedings against several other Nation properties. Sherrill purchased four parcels, 322.015-2-1, 322.014-1-24, 322.015-2-65, and 322-015-2-64, at a tax sale on November 5, 1998. On March 6, 2000, Sherrill notified the Nation of the impending expiration of the redemption period of November 5, 2000, for these four parcels.

On November 10, 1999, Sherrill purchased an additional three parcels, 322-015- 2-40.3, 322-015-2-45.1, 322-015-2-47 at tax sale. On March 6, 2000, Sherrill notified the Nation that the redemption period for these three parcels would expire on November 10, 2001.

Sherrill alleges a total tax liability for all of these parcels of approximately $15,000. The above-captioned actions followed.

B. *Madison County Properties*

In the 1990s the Nation acquired thirteen parcels of land located within Madison County. These parcels are identified as 28.-2-13.11, 28.-2-13.2, 36.5-1-20, 36.38-1-34, 36.6-1-4, 36.38-1-33, 36.38-1-32, 36.62-2-21, 91.-1-51, 36.6-1-1, 36.6-1-3, 36.-1-2, and 28.-2-13.12. The county assessed property taxes against these parcels. The Nation again asserted that these properties were within the Reservation and therefore were nontaxable. On December 1, 1999, the county initiated

an *in rem* foreclosure action, for nonpayment of taxes, against these parcels in New York State Supreme Court, Madison County. The Nation alleges that Madison County never provided it with notice or a redemption period, as required by New York State law.

C. *Historical Background*

A brief discussion of the historical background of the Nation and its lands, as well as the federal policy toward the Indians lends perspective to the claims and the arguments. From before the Revolutionary War colonists' interaction with the Indians was in the spirit of cooperation and good faith. The Indians' right to the possession of their aboriginal lands was assumed, and termination of such title was restricted. *Oneida II*, 470 U.S. at 234, 105 S.Ct. at 1251. The Oneidas[1] claimed aboriginal lands of six million acres in Central New York, from Lake Ontario to the Adirondack foothills and from Pennsylvania north to the St. Lawrence River. *Id.* at 230, 105 S.Ct. at 1249. In 1784, shortly after the Revolutionary War ended, the first treaty between the United States and the Indians was executed, at Fort Stanwix, New York (present day Rome, New York). The United States, in recognition for the Oneidas' support during the war, guaranteed the Oneidas security " 'in the possession of the lands on which they are settled.' " *Id.* at 231, 105 S.Ct. at 1249-50 (quoting the Treaty of Fort Stanwix, 7 Stat. 15 (Oct. 22, 1784)).

In 1790 Congress passed, in keeping with the policy of protecting the Indians and their lands, the first Indian Trade and Intercourse Act, ch. 33, 1 Stat. 137. *Id.* Commonly referred to as the Nonintercourse Act, now codified at 25

[1] The Oneidas were one of the Six Nations of the Iroquois, "the most powerful Indian Tribe in the Northeast at the time of the American Revolution." Id. at 230, 105 S.Ct. at 1249. The Six Nations consisted of the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora nations.

U.S.C. § 177, this legislation prohibited conveyance of Indian lands except by treaty with the federal government. *Id.* at 231, 105 S.Ct. at 1251. Later amendments continue the prohibition on alienation of Indian land without congressional action. *See* 25 U.S.C. § 177.

In 1788 New York State purchased most of the Nation's remaining land, reserving 300,000 acres to the Nation. *Oneida II*, 470 U.S. at 231, 105 S.Ct. at 1250. Other treaties, such as the Treaty of Harmar, 7 Stat. 33 (Jan. 9, 1789), and the Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794), reaffirmed the federal government's promise of security to the Oneidas in the possession of their lands. *Oneida II*, 470 U.S. at 231, 105 S.Ct. at 1250. The Sherrill parcels are among the lands reserved to the Nation in 1788 and confirmed as reservation land in the Treaty of Canandaigua.[2] (Thomas Decl. ¶ 10.) In 1795 New York State purchased the majority of the Oneidas' remaining 300,000 acres. *Oneida II*, 470 U.S. at 231, 105 S.Ct. at 1250. Thereafter, fee title to the land has passed in free market transactions.[3]

Beginning in the early 1800's the federal policy toward the Indians shifted toward removing Indians from the east into the western territories. Felix S. Cohen, *Handbook on Federal Indian Law* 78-79 (1982 ed.) [hereinafter "Cohen"]. Treaties during this period provided for the relinquishment of Indian land in the east and set apart reservation land for the

[2] Sherrill contends that issues of fact remain as to whether the Sherrill parcels are within the reservation confirmed by the Treaty of Canandaigua. (Sacks Aff. Jan. 30, 2001, 4.) However, Sherrill has adduced no competent evidence to raise such a question of fact.

[3] The United States Supreme Court has determined that the Oneidas have a federal common law right of action for violation of their possessory rights to these lands, due to the undisputed lower court finding that the 1795 purchase violated the Nonintercourse Act. Id. at 233, 236, 105 S.Ct. at 1250, 1252.

Indians in the west. *See generally id.* at 78-92. Movement of the eastern tribes to the west freed the eastern land for white settlements.

Between 1820 and 1822 some Oneidas and other New York Indians relocated to land purchased on their behalf from the Menominee and Winnebago nations in Wisconsin.[4] *New York Indians*, 170 U.S. at 12-14, 18 S.Ct. at 533. Some disagreement about the land ensued, and approximately 500,000 acres in Wisconsin were reserved for the use of the Oneidas and other New York Indians. *Id.* at 14, 18 S.Ct. at 533. Other Oneidas relocated to Ontario, Canada. *Oneida Indian Nation v. County of Oneida*, 434 F.Supp. 527, 536 (N.D.N.Y.1977) (Port, J.), *aff'd*, 719 F.2d 525 (2d Cir.1983), *aff'd in part & rev'd in part*, 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985). The Oneida Nation thus splintered into three distinct bands, the New York Oneidas, the Wisconsin Oneidas, and the Thames Oneidas. *See id.*

In 1830 Congress passed the Indian Removal Act, ch. 148, 4 Stat. 411, authorizing the exchange of eastern land for land west of the Mississippi River. Cohen at 81. Among the removal treaties into which the Indians and the federal government entered was the Treaty of Buffalo Creek, 7 Stat. 550 (Jan. 15, 1838). *New York Indians*, 170 U.S. at 1, 18 S.Ct. at 531. Pursuant to the Treaty of Buffalo Creek the New York Indians, including Oneidas, ceded Wisconsin reservation lands in exchange for reservation lands west of the Mississippi River in what is now Kansas. *Id.* at 15, 18 S.Ct. at 533. The Treaty of Buffalo Creek further provided that New York Oneidas "hereby agree to remove to their new homes in the Indian territory, as soon as they can make

[4] Also relocating to the 500,000-acre Wisconsin reservation during this period were some members of other tribes of the Six Nations, as well as the St. Regis, Stockbridge, and Munsee tribes. New York Indians v. United States, 170 U.S. 1, 12-13, 18 S.Ct. 531, 533, 42 L.Ed. 927 (1898).

satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." 7 Stat. § 550 Art. 13. However, the Indians did not remove to Kansas. *New York Indians*, 170 U.S. at 9-10, 18 S.Ct. at 532-33. Moreover, there is no evidence that "satisfactory arrangements with the Governor of the State of New York" were ever made for the purchase of the Oneidas' New York lands.

Toward the latter 1800's the federal policy shifted toward assimilating the Indians into the white culture. *Solem v. Bartlett*, 465 U.S. 463, 466, 104 S.Ct. 1161, 1164, 79 L.Ed.2d 443 (1984). This assimilation policy was carried out through allotment. *See id.* at 467, 104 S.Ct. at 1164; *see generally* Cohen at 128-132. The Dawes Act, ch. 119, 24 Stat. 388, and subsequent surplus land acts,[5] furthered this policy. *See* Cohen at 130-32. The surplus land acts provided for the allotment of set amounts of acreage to individual Indians, with the land held in severalty. *Id.* at 130-31. The allotments made to individual Indians were inalienable for twenty- five years, in keeping with the federal policy of protecting the Indians and their lands, after which it was thought that the Indians would assimilate into the culture of the white settlers who by then would surround the allotted land. Small amounts of land were reserved for tribal ownership to be used for common purposes, such as education. Unallotted, or surplus, lands were then opened for homesteading by white settlers. More than 90 million acres of tribal land were opened for settlement in this manner.

Allotment resulted in a checkerboard pattern of Indian and non-Indian ownership of reservation lands. Depending upon Congressional intent in opening the lands, some surplus lands

[5] In 1871 Congressional action ended treaty-making with the Indians. Cohen at 107 & n. 371. Thereafter, congressional action, in statutory form, was required for each cession or other conveyance of Indian land.

have been found to continue to constitute reservation land, *see, e.g., Solem*, 465 U.S. at 481, 104 S.Ct. at 1171, and in some cases not, *see, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 338, 118 S.Ct. 789, 805, 139 L.Ed.2d 773 (1998).

By the early twentieth century the federal policy again shifted, recognizing that assimilation was not occurring and preservation of the Indian culture was not only acceptable but desirable. Cohen at 144. In 1934 the Indian Reorganization Act ended allotment, encouraged tribal self-government, made funds available for economic improvement of the Indians, and made further provisions for protecting Indian lands. *See id.* at 147-49. However, as World War II came to an end resistance to reorganization developed and a policy aimed at terminating federal control and supervision of the Indian tribes evolved. *Id.* at 152-59. Once terminated, a tribe lost its sovereignty and became subject to state jurisdiction. *Id.* at 174-75.

The termination policy was repudiated in 1958, and an era of Indian self- determination began. *Id.* at 180. This policy shift reflected the overall rise in concern for the civil rights of all ethnic minorities. *Id.* at 180- 81. Beginning in 1973 Congress restored the sovereignty of several of the tribes previously terminated. *Id.* at 186-87. Programs were funded to improve Indian housing, education, economic development, health, and culture. *Id.* at 189-96. Moreover, a policy toward the development of reservations and return of aboriginal lands to the Indians arose. *Id.* at 196-200.

From the late 1700s until the middle 1960s the Oneidas attempted, in vain, to obtain redress for land claims and other grievances. *Oneida Indian Nation of New York State v. County of Oneida*, 719 F.2d 525, 529 (2d Cir.1983) (noting that the Oneidas perceived their treatment by the State during this period as "improper, deceitful, and overreaching"). In

1970 the Nation brought a lawsuit seeking damages for the "illegal use and occupancy of a part of their aboriginal land" during 1968 and 1969. *Id.* at 532. The suit was originally dismissed at the trial court level for lack of jurisdiction. *Id.* at 530. On appeal, the United States Supreme Court found that federal question jurisdiction existed. *Oneida Indian Nation v. County of Oneida, New York*, 414 U.S. 661, 678, 94 S.Ct. 772, 782-83, 39 L.Ed.2d 73 (1974). After a finding of liability and the assessment of damages in the trial court,[6] the United States Supreme Court affirmed the Oneidas' federal common law right of action for unlawful possession of their lands. *Oneida II*, 470 U.S. at 233, 105 S.Ct. at 1251.

In 1974 the New York and Wisconsin Oneidas filed an additional land claim action. *See Oneida Indian Nation*, 199 F.R.D. at 66. At issue in that action is approximately 250,000 to 300,000 acres that the Oneidas claim was illegally alienated by some thirty agreements. *Id.* at 66 & n. 3.

In the 1990s the Nation began reacquisition of lands within the Reservation. These reacquisitions have taken place in free market transactions, and the Nation received fee simple title to the properties.

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[6] The trial court assessed damages in the amount of "$9,060 plus interest against Madison County and $7,634 plus interest against Oneida County for their unlawful use and occupation of the Oneidas' land for the years 1968 and 1969." Oneida Indian Nation of New York State, 719 F.2d at 540. The Second Circuit affirmed the finding of liability but remanded for recomputation of damages. Id. at 544. The United States Supreme Court granted the petition for certiorari brought by Madison and Oneida Counties and New York State, see 465 U.S. 1099, 104 S.Ct. 1590 (1984), to answer the question of whether the Oneidas "may bring a suit for damages for the occupation and use of tribal land allegedly conveyed unlawfully in 1795." 470 U.S. at 229, 105 S.Ct. at 1248-49.

III. *CLAIMS, COUNTERCLAIMS, AND DEFENSES*

A. *Lead Case*

In the Lead Case the Nation sues Sherrill to terminate its efforts to enforce its *ad valorem* property tax laws with respect to land owned by the Nation located within Sherrill. The Nation avers that the properties at issue are within and are a part of the Reservation recognized by the 1794 Treaty of Canandaigua. The Nation further avers that the properties have always been a part of the Reservation, although the Nation was not in possession, and the federal government has never changed the Reservation status nor made properties within the Reservation subject to state or local taxation. The Nation claims that in 1805 New York State caused the properties to be conveyed to one Cornelius Dockstader, a Nation member. In 1807 New York purported to give permission for Dockstader to sell the land, and Dockstader did sell the land to a non-Indian. Thereafter the properties have been in the possession of non- Indians until the reacquisition of the properties in 1997-98. The Nation claims that these conveyances were in violation of the Nonintercourse Act, 25 U.S.C. § 177, and therefore are void *ab initio*.

The Nation first claims that the properties constitute Reservation land and therefore are Indian Country within the meaning of 18 U.S.C. § 1151. According to the Nation, under Article I, Section 8 of the United States Constitution authority over this property is exclusive to the federal government, precluding the state and its political subdivisions from imposing their taxes. Imposition of such taxes by the states and its political subdivisions also violates the Nation's tribal sovereign immunity. The Nation seeks redress from the aforesaid violations of the rights guaranteed by the Constitution and laws of the United States pursuant to 42 U.S.C. § 1983.

For its second claim the Nation avers that the process by which Sherrill purported to deprive the Nation of its properties and evict it from the properties failed to provide due notice. The Nation therefore seeks redress under 42 U.S.C. § 1983 for this alleged violation of its due process rights as secured by the Constitution and laws of the United States and the laws of New York.

The Nation seeks a declaration that Sherrill may not impose or attempt to collect property taxes based upon lands owned and possessed by the Nation within Sherrill, that the Nation and its lands are not subject to taxation by Sherrill, that Sherrill's purported conveyances of the properties for delinquency of taxes are null and void, and that Sherrill may not evict the Nation from its lands and any attempt to do so are null and void. The Nation further seeks an injunction prohibiting Sherrill and any other person in active concert or participation with Sherrill from subjecting the Nation and its lands to property taxation, prohibiting it from interfering with the Nation's ownership and possession of its lands and from any effort to evict the Nation from such lands, and mandating that they void and rescind all notices, liens, sales, auctions, conveyances and other official documents or acts taken with respect to enforcement of the property tax laws as against the Nation and its lands. Finally, the Nation seeks attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

Sherrill answered, denying the material allegations of the complaint. Sherrill also brings counterclaims. Sherrill avers that despite wrongful nonpayment of taxes, and in some cases foreclosure, the Nation remains in possession of the properties. Sherrill claims that the Nation has been and is being unjustly enriched by receipt of valuable municipal benefits including police and fire protection, garbage removal, road maintenance, and zoning enforcement and planning. First Sherrill seeks a declaration that it may

properly assess property taxes against these properties and any other properties that may come into the Nation's possession in the future. Second, Sherrill seeks a judgment evicting the Nation from the foreclosed property. Third, Sherrill seeks damages for the unjust enrichment of the Nation for services provided by the municipality. Fourth, Sherrill requests a preliminary and permanent injunction prohibiting the Nation from purchasing additional properties, any part of which are located within Sherrill's boundaries. Finally, Sherrill seeks an order enjoining the Nation from building and/or expanding upon the existing building structure, or erecting new structures, on the foreclosed properties.

The Nation denies the material allegations of the counterclaims, including Sherrill's right to tax the properties. The Nation also asserts the affirmative defenses of failure to state a claim; sovereign immunity; violation of federal law; federal law preemption; the Supremacy Clause of the United States Constitution; due process violation; violation of the Nonintercourse Act; violation of the Equal Protection Clause of the United States Constitution; violation of the Due Process Clause of the United States Constitution; violation of the Takings Clause of the United States Constitution; violation of the Privileges and Immunities Clauses of the United States Constitution; prohibition of the relief requested by the Indian Commerce Clause, the Fifth Amendment, and the Fourteenth Amendment; failure of the Congress to authorize taxation or alienation of the lands in dispute; entitlement to set-off for funds paid to Oneida County pursuant to the Silver Covenant Chain Grant program; nonjusticiability; and estoppel due to Sherrill's refusal to accept the Silver Covenant Chain Grant payments.

B. *Eviction Case*

Sherrill petitioned New York State Supreme Court, Oneida County, to order an eviction of the Nation from the properties designated as 322.014-1-23, 322.014- 1-25, and 322.014-1-26. The petition asserts that Sherrill acquired the title to these properties through foreclosure and sale for nonpayment of taxes. The Nation removed the action to this court asserting that federal law completely preempts Sherrill's claim that it has title to and the right to possess this land and the eviction action is a compulsory counterclaim to the Lead Case. In answer the Nation denies that Sherrill has the right to assess taxes against the properties or that it holds valid title to the properties. The Nation asserts the affirmative defenses of failure to state a claim; sovereign immunity; federal law protection of reservation land; federal preemption of state and local law; the Supremacy Clause of the United States Constitution; insufficient process and service of process; violation of due process as set forth in the Lead Case; and the petition is duplicative of a compulsory counterclaim in the Lead Case.

C. Member Case

Sherrill avers that the Nation representatives dominate and control the Nation and its activities. Sherrill claims that the Nation representatives caused the Nation to refuse to pay the property taxes it assessed against the properties and to fail to collect state sales tax on goods sold on the properties, including goods sold to non-Indians. Sherrill further avers that the Nation's refusal to pay property taxes and collect sales taxes, at the direction of the Nation representatives, causes tax-paying citizens to suffer in the quality and availability of municipal services. Sherrill asserts that because the Nation may plead sovereign immunity as a bar to any lawsuit to collect taxes owed, the responsible Nation representatives may be sued. As a first cause of action

Sherrill seeks a declaratory judgment that it may lawfully impose and attempt to collect property taxes from the Nation representatives on the properties currently owned by the Nation and on any properties acquired by the Nation in the future, and that its Charter applies to such properties. Sherrill further seeks a declaration that the Nation representatives are in violation of New York State law because the Nation refuses to collect state sales tax on the properties. Sherrill's second cause of action is for an order evicting the Nation representatives and all other Oneidas from the foreclosed property. Third, Sherrill seeks damages for what it alleges to be unjust enrichment of the Nation by provision of municipal services. Fourth, Sherrill requests a preliminary and permanent injunction prohibiting the Nation representatives from purchasing additional properties, any part of which are located within the boundaries of Sherrill, without first agreeing to pay property tax and agreeing to collect state sales tax on any additional properties. Sherrill's fifth cause of action is for a preliminary and permanent injunction prohibiting the Nation representatives from expanding and/or building upon the existing structure and/or erecting new structures on Nation-owned properties within Sherrill boundaries.

In lieu of an answer the Nation representatives move for a stay pending a decision on summary judgment in the Lead Case, which may moot this action, or to dismiss. The motion to dismiss is based upon failure to state a claim because the Nation representatives are not the owners of the properties; Sherrill lacks authority to enforce property taxes due to federal law; Sherrill lacks authority to enforce the state sales tax law and the property tax as set forth in the Sherrill City Charter under the property and sales tax laws of New York State; Sherrill has failed to name indispensable parties the Nation, New York State, and all other owners of land in Sherrill; and tribal sovereign immunity.

D. *Related Case*

The Nation brings this action to prevent Madison County from pursuing further efforts to enforce its *ad valorem* property tax laws with respect to Nation lands located within the County. The Nation avers that the properties at issue are located within and are part of the Reservation recognized in the 1794 Treaty of Canandaigua. The Nation further avers that the federal government has never modified the reservation status of these properties nor made them subject to taxation by a state or local government. One of the properties at issue was alienated by a 1795 Treaty between the Oneidas and New York State. The other properties were transferred by a Treaty with New York State in 1807. Since 1795 and 1807, respectively, the properties were out of the Nation's possession until their reacquisition in the 1990s. The Nation avers that neither transaction met the requirements of the Nonintercourse Act, and therefore were void *ab initio*.

The Nation's first claim is that federal law, including the 1794 Treaty of Canandaigua; Article I, Section 8 of the United States Constitution; the Nonintercourse Act; and federal common law, preempt any right of Madison County to impose taxes upon the properties and attempts by the county to collect such taxes violates federal law. This claim also avers that the county's attempts to collect such taxes violate the Nation's sovereign immunity, as well as the rights, privileges, and immunities secured to the Nation by the United States Constitution and laws. Secondly, the Nation avers that the county failed to give it the process it was due with regard to taxation and foreclosure upon Nation lands. The Nation therefore seeks a declaration that the county may not impose or seek to collect *ad valorem* property taxes from the Nation based upon the lands it owns and possesses; the Nation and its lands are not subject to such taxation; any purported taxation or foreclosure for tax

delinquency is null and void; and the state court is without jurisdiction or power with respect to taxation of Nation lands. It also seeks an injunction prohibiting Madison County from subjecting the Nation and its lands to *ad valorem* property taxation; prohibiting the county from any interference with ownership and possession of its lands and from efforts to foreclose on the Nation's lands or to litigate in state court concerning taxation of its lands; and mandating that the county void and rescind all notices, liens, petitions, and other official documents or acts taken with respect to enforcement of such taxes as against the Nation and its lands. Finally, the Nation seeks attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

Madison County filed its motion to dismiss in lieu of an answer. The county asserts that the Wisconsin and Thames Oneidas are indispensable parties, and as they cannot be joined, the action should be dismissed pursuant to Fed.R.Civ.P. 19. The Nation opposes. This motion is addressed in a separate Memorandum-Decision and Order filed this day.

IV. *DISCUSSION*

A. *Summary Judgment Standard*

Summary judgment must be granted when the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law. Fed.R.Civ.P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986); *Lang v. Retirement Living Pub. Co.*, 949 F.2d 576, 580 (2d Cir.1991); *Cayuga Indian Nation of New York v. Cuomo*, 667 F.Supp. 938, 940 (N.D.N.Y.1987). The moving party carries the initial burden of demonstrating an absence of a genuine issue of material

fact. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Thompson v. Gjivoje*, 896 F.2d 716, 720 (2d Cir.1990). Facts, inferences therefrom, and ambiguities must be viewed in a light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Project Release v. Prevost*, 722 F.2d 960, 968 (2d Cir.1983).

Disputes as to irrelevant or unnecessary facts are immaterial. *Cayuga Indian Nation*, 667 F.Supp. at 940 (quoting *Liberty Lobby, Inc.*, 477 U.S. at 248, 106 S.Ct. at 2510). " 'Any proof or evidentiary requirements imposed by the substantive law are not germane to [the materiality] inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.' " *Id.* (quoting *Liberty Lobby, Inc.*, 477 U.S. at 248, 106 S.Ct. at 2510).

When the moving party has met its the burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586, 106 S.Ct. at 1356. At that point, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56; *Liberty Lobby, Inc.*, 477 U.S. at 250, 106 S.Ct. at 2511; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587, 106 S.Ct. at 1356. To withstand a summary judgment motion, sufficient evidence must exist upon which a reasonable jury could return a verdict for the nonmovant. Liberty Lobby, Inc., 477 U.S. at 248- 49, 106 S.Ct. at 2510; see Matsushita Elec. Indus. Co., 475 U.S. at 587, 106 S.Ct. at 1356 (stating that there is no genuine issue for trial "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party"). Merely colorable or not significantly probative evidence is insufficient to

withstand summary judgment. *Cayuga Indian Nation*, 667 F.Supp. at 940-41 (quoting *Liberty Lobby, Inc.*, 477 U.S. at 249- 50, 106 S.Ct. at 2511).

B. *Indian Country*

The parties agree that the basic question for resolution in this case is whether the properties in issue are Indian Country. If the properties are Indian Country, the state and its municipalities lack jurisdiction to impose property taxes,[7] absent explicit congressional direction. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458, 115 S.Ct. 2214, 2220, 132 L.Ed.2d 400 (1995) (citation omitted); *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 128, 113 S.Ct. 1985, 1993, 124 L.Ed.2d 30 (1993); *see McClanahan v. State Tax Comm'n*, 411 U.S. 164, 169, 93 S.Ct. 1257, 1260-61, 36 L.Ed.2d 129 (1973) (citing *The Kansas Indians*, 72 U.S.(5 Wall.)737, 18 L.Ed. 667 (1866)).

The statutory definition of Indian Country, although found in the criminal code at 18 U.S.C. § 1151, " 'applies to questions of both criminal and civil jurisdiction.' " *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 915 (1st Cir.1996) (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208, 107 S.Ct. 1083, 1088, 94 L.Ed.2d 244 (1987)). Classification of certain lands as Indian Country "is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian land." *Id.* (internal quotations omitted). The determination of whether certain land constitutes Indian Country is a matter for the court rather than the jury. *United States v. Roberts*, 185 F.3d 1125, 1140 (10th Cir.1999) (citing *United States v. Cook*, 922 F.2d 1026, 1031-32 (2d Cir.1991)).

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[7] No argument is made that should a finding be made that the properties in question are Indian Country, they are nonetheless taxable.

Indian Country includes " 'formal and informal reservations, dependent Indian communities, and Indian allotments.' " *Chickasaw Nation*, 515 U.S. at 453 n. 2, 115 S.Ct. at 2217 n. 2 (quoting *Sac & Fox Nation*, 508 U.S. at 126, 113 S.Ct. at 1991); *Thompson v. County of Franklin*, 15 F.3d 245, 250 (2d Cir.1994). Section 1151 provides, with exceptions not relevant here, that Indian Country means:

> (a) land within the limits of an Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which haven not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. Thus, a formal reservation falls within the definition of Indian Country. *Cabazon Band of Mission Indians*, 480 U.S. at 207 n. 5, 107 S.Ct. at 1087 n. 5. However, formal reservation status is not a prerequisite to qualification as Indian Country. *HRI, Inc. v. Envtl. Prot. Agency*, 198 F.3d 1224, 1249 (10th Cir.2000). Rather, determinative is whether there has been a valid set aside of the land by the federal government for the Indians' use and federal supervision of the land. *Id.* at 1249-50; *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511, 111 S.Ct. 905, 910, 112 L.Ed.2d 1112 (1991).

Reservation status of Indian land may be changed only upon a plain and unambiguous expression of congressional intent to do so. *Cayuga Indian Nation*, 667 F.Supp. at 944 (citing

Oneida II, 470 U.S. at 247-48, 105 S.Ct. at 1258); *Narragansett Indian Tribe*, 89 F.3d at 914. Congressional intent to terminate Indian title to land will not be " 'lightly implied' " because of the "strong policy of the United States 'from the beginning to respect the Indian right of occupancy.'" *Oneida II*, 470 U.S. at 248, 105 S.Ct. at 1258 (quoting *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 345-46, 62 S.Ct. 248, 251, 86 L.Ed. 260 (1941)).

Because Congressional action is required to alienate Indian land, 25 U.S.C. § 177, either a treaty approved by Congress[8] or a statute must plainly and unambiguously express the intent to effect such an alienation, *see Oneida II*, 470 U.S. at 247-48, 105 S.Ct. at 1258. Canons of construction "rooted in the unique trust relationship between the United States and the Indians" apply in interpreting treaties and statutes involving Indians. *Id.* at 247, 105 S.Ct. at 1258. Treaties must be given a liberal construction in favor of the Indians. *Id.* Ambiguous provisions must be interpreted to the benefit of the Indians. *Id.* An abrogation of Indian treaty rights will not be found absent explicit language. *Id.*

In keeping with the strong policy of the federal government to protect Indian lands, once an Indian tribe makes out a prima facie case of prior possession or title to the property in dispute, the burden of proof rests upon the non-Indian to demonstrate otherwise. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 668-69, 99 S.Ct. 2529, 2538-39, 61 L.Ed.2d 153 (1979) (citing 25 U.S.C. § 194). The burden of proof thus shouldered by the non-Indian questioning Indian title

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[8] Beginning in 1871 Indian tribes were no longer dealt with by treaty, but solely by legislative act. Stephens v. Cherokee Nation, 174 U.S. 445, 483, 19 S.Ct. 722, 736, 43 L.Ed. 1041 (1899) (quoting 16 Stat. 544 § 2079). The legislation that ended Indian treaty-making provided that prior treaties remained valid. Id.

encompasses both the burden of producing evidence and the burden of persuasion. *Id.*

C. *Analysis*

As the motion and cross-motion for summary judgment turn on a determination of the Indian Country status of the properties, a separate analysis of each will not be undertaken. Rather, the Indian Country status will be analyzed, then the implications of that determination upon each motion will be evaluated.

Sherrill argues that the properties in issue are not Indian Country because they (1) were purchased in private transactions; (2) were not purchased from the federal government; (3) have not been set aside by the federal government for Indian use; (4) are not superintended by the federal government; and (5) receive services not from the federal government, but rather from Sherrill. Oneida Ltd., the Counties, and New York State, as amici curiae, argue that the Reservation was disestablished or diminished by the 1838 Treaty of Buffalo Creek and therefore the properties are not Indian Country.

The Nation argues that the properties are within its aboriginal lands and within the Reservation guaranteed by the 1794 Treaty of Canandaigua. The Nation further argues that the Reservation was not disestablished or diminished and therefore the properties in issue are Indian Country. The Nation does not contend that the properties constitute a dependent Indian community pursuant to 18 U.S.C. § 1151(b), or Indian allotment pursuant to 18 U.S.C. § 1151(c).

The arguments of the parties thus turn on a determination of the reservation status of the properties, pursuant to 18 U.S.C.

§ 1151(a). This determination will answer the Indian Country and taxability inquiries, as previously noted.

The Oneidas' aboriginal lands encompassed six million acres of Central New York. *See Oneida II*, 470 U.S. at 230, 105 S.Ct. at 1249. The properties at issue are within the Oneidas' aboriginal lands. *Id.* (describing the extent of the Oneida land from the Pennsylvania border to the St. Lawrence River and from Lake Ontario to the Adirondack foothills). The Nation further relies upon the 1794 Treaty of Canandaigua and its expert's conclusion that the properties are within the Reservation confirmed by that Treaty.

The Treaties of Fort Stanwix and Fort Harmar designated the Reservation land. (First Carmen Aff. Ex. 3-4.) The 1788 Treaty of Fort Schuyler again designated the land reserved to the Oneidas. *Id.* Ex. 5. The Treaty of Canandaigua confirmed and guaranteed the Nation's right to occupy those Reservation lands. *Id.* Ex. 6. The properties are within the Reservation lands. (Thomas Decl. ¶ 10.) The properties were conveyed to one Cornelius Dockstader, an Oneida, in 1805. *Id.* at ¶ 11(b); First Carmen Aff. Ex. 8. Dockstader conveyed the lands to one Peter Smith in 1807. (Thomas Decl. Ex. 11(c); First Carmen Aff. Ex. 10.) Thereafter, the lands were conveyed to others until 1997 and 1998. (Thomas Decl. Ex. 11(d).)

Sherrill contends that these facts are in dispute. (See Sherrill Resp. L.R. 7.1 Statement.)[9] However, Sherrill has not set

[9] Local Rule 7.1(a) (3) provides

> Any motion for summary judgment shall contain a Statement of Material Facts. The Statement of Material Facts shall set forth, in numbered paragraphs, each material fact the moving party contends there exists no genuine issue. Each fact listed shall set forth a specific citation to the record where the fact is established. The record for purposes of the Statement of Material Facts includes the pleadings, depositions, answers to

forth competent evidence that raises a dispute as to these facts. For example, the Nation set forth the following as an undisputed fact: "The Nation's lands in Sherrill were part of the lands possessed by the Nation for centuries before this country was formed, often referred to as 'aboriginal' lands. Carmen Aff. at ¶ 6." (Nation L.R. 7.1 Statement.) Sherrill responded as follows: "Sherrill does not have sufficient information to admit or dispute paragraph 3." (Sherrill Resp. L.R. 7.1 Statement ¶ 3.) The Nation also set forth the following as an undisputed fact: "The Nation's lands in Sherrill were part of the Oneida reservation guaranteed and confirmed in the 1794 Treaty of Canandaigua. Carmen Aff. at ¶ ¶ 9-10, exh.6; Declaration of Paul A. Thomas, Jr., at ¶ 10." (Nation L.R. 7.1 Statement.) In response, Sherrill again stated: "Sherrill does not have sufficient information to admit or dispute paragraph 4." (Sherrill Resp. L.R. 7.1 Statement ¶ 4.) The Nation stated: "The reservation lands that the Nation now possesses in Sherrill were out of the Nation's possession from 1805 to 1997-1998. Carmen Aff. at ¶¶ 14-15, exhs. 8- 10." (Nation L.R. 7.1 Statement ¶ 9.) Sherrill responded: "Sherrill disputes paragraph 9. [The Nation] has no reservation land in Sherrill. See Sherrill Mem. at 14-16. Sherrill does not have sufficient information to admit or dispute the remaining content of paragraph 9." (Sherrill Resp. L.R. 7.1 Statement ¶ 9.)

As these responses demonstrate, Sherrill has not raised even a metaphysical doubt as to these material facts set forth by the Nation as undisputed. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 586, 106 S.Ct. at 1356. Moreover, Sherrill has not set forth any additional facts as to which it contends a dispute exists. (*See* Sherrill Resp. L.R. 7.1 Statement.) Against the backdrop of these undisputed facts, the Indian Country analysis will be carried out.

The undisputed facts establish that the properties are within the Oneidas' aboriginal lands and within the Reservation confirmed by the 1794 Treaty of Canandaigua. The Nation has thus made a prima facie showing of prior possession and title to the properties. *See Omaha Indian Tribe*, 442 U.S. at 668-69, 99 S.Ct. at 2538 (finding that a showing that land was once occupied by the tribe as a reservation sufficient to constitute prima facie showing to raise 25 U.S.C. § 194 presumption). Sherrill must now offer sufficient evidence to show that the Oneidas are no longer entitled to possession of the properties or that it will prevail on its affirmative defenses.[10] *See id.* at 669, 99 S.Ct. at 2538.

> interrogatories, admissions and affidavits. It does not, however, include attorney's affidavits. Failure of the moving party to submit an accurate and complete Statement of Material Facts shall result in a denial of the motion.
>
> The opposing party shall file a response to the Statement of Material Facts. The non-movant's response shall mirror the movant's Statement of Material Facts by admitting and/or denying each of the movant's assertions in matching numbered paragraphs. Each denial shall set forth a specific citation to the record where the factual issue arises. The non-movant's response may also set forth any additional material facts that the non- movant contends are in dispute. Any facts set forth in the Statement of Material Facts shall be deemed admitted unless specifically controverted by the opposing party.

Thus, in order to withstand a motion for summary judgment a party must specifically cite to the record for the evidence that raises a factual issue. L.R. 7.1(a) (3). Merely stating that a fact is in dispute, without citing to record evidence that raises a dispute, is insufficient. *See id.*

[10] While Sherrill initially did not assert affirmative defenses, the currently-pending motion to amend its answer seeks to add affirmative defenses. Accordingly, the proposed asserted defenses will be evaluated below in section IV.D.1.c.

Sherrill first argues that the Oneidas' right to possession of the properties derives from its fee title. Sherrill argues that the Oneidas' open market purchase of fee title is inconsistent with federal set aside and superintendence.[11] Sherrill cites *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998), in support of this argument. In *Venetie*, the Supreme Court explained its reliance in prior cases

> upon a finding of both a federal set-aside and federal superintendence in concluding that the Indian lands in question constituted Indian country and that it was permissible for the Federal Government to exercise jurisdiction over them. Section 1151 does not purport to alter this definition of Indian country, but merely lists the three different categories of Indian country mentioned in our prior cases: Indian reservations, dependent Indian communities, and allotments.

Id. at 530, 118 S.Ct. at 954 (internal citations omitted). *Venetie*, however, concerns whether nonreservation land constituted a dependent Indian community and therefore Indian Country. *Id.* at 527, 118 S.Ct. at 953 (holding that two requirements, set aside and superintendence, must be met for land that is neither a reservation nor an allotment to be considered a dependent Indian community). The land at issue had formerly been reservation land, but the reservation was revoked by the Alaska Native Claims Settlement Act. *Id.* The *Venetie* Court noted that before the amendment of Section 1151 to include dependent Indian community within the statutory definition of Indian Country, the Court had held in three cases that "Indian lands that were not reservations could be Indian [C]ountry." *Id.* at 528, 118 S.Ct. at 953. In

[11] It is unnecessary to evaluate Sherrill's arguments relating to dependent Indian community and Indian allotment, as the Nation does not contend that the properties constitute either classification.

those cases, the Court required a two pronged showing: federal set aside for the use of the Indians as Indian land and federal superintendence. *Id.* at 528-530, 118 S.Ct. at 953-54.

The *Venetie* Court explained that in *United States v. Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913), Pueblo Indian land held in fee simple by the Pueblo, restricted from alienation by the federal government, met the set aside and superintendence requirements and constituted Indian Country, although the land was not a formal reservation. *Id.* Similarly, the Court explained that in *United States v. Pelican*, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1914), allotted lands held in trust by the federal government for the benefit of individual Indians were Indian Country despite diminishment of the reservation. *Id.* The Venetie Court further explained that in *United States v. McGowan*, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1938), it held that the set aside and superintendence requirements were met, where although the land was not a reservation it was held in trust for the Indians by the federal government and the government had authority to pass laws regulating the territory. *Id.* Thus, none of these cases holding that set aside and superintendence showings are prerequisites to qualify as Indian Country involved reservations.

The two-prong test set forth in *Venetie* does, however, parallel the test for establishing Indian Country status when the land in question is not a formal reservation, as set forth in *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 511, 111 S.Ct. at 910. *Roberts*, 185 F.3d at 1133. In *Roberts*, property held in trust by the government for Indian benefit, found by the lower court to be validly set aside and under federal superintendence, was Indian Country. *Id.* In *Citizen Band Potawatomi Indian Tribe*, the land in question was held for the Indians in trust by the government. 498 U.S. at 511, 111 S.Ct. at 910. The Supreme Court found that the test for Indian Country does not depend upon the denomination of

the property as "trust land" or "reservation." *Id.* Accordingly, the trust land, which was validly set apart and subject to federal superintendence, "qualifie[d] as a reservation for tribal immunity purposes."[12] *Id.* at 511, 111 S.Ct. at 910.

It is apparent, therefore, that federal set aside and superintendence are required in order to find that an informal reservation is Indian Country under § 1151(a) and that nonreservation land is a dependent Indian community. What Sherrill has not cited, and what has not been found after exhaustive research, is any case in which federal set aside and superintendence were prerequisites to a finding that a valid, formal reservation was Indian Country. To the contrary, as the aforementioned review of cases shows, it appears that there is no such requirement for federal set aside and superintendence when the property in question is a formal reservation.

The *Venetie* Court noted that it "had also held, not surprisingly, that Indian reservations were Indian [C]ountry." 522 U.S. at 528 n. 3, 118 S.Ct. at 953 n. 3. *Venetie* therefore supports the Nation's view that the set aside and superintendence requirements are inherent to a validly established reservation, and need not be separately proven to support a finding that a reservation is Indian Country. *See id.* at 528 & n. 3, 118 S.Ct. at 953 & n. 3; *Donnelly v. United States*, 228 U.S. 243, 269, 33 S.Ct. 449, 458, 57 L.Ed. 820 (1913) (stating that "in our judgment, nothing can more appropriately be deemed 'Indian [C]ountry,' ... than a tract of land ... lawfully set apart as an Indian reservation").

Accordingly, Sherrill's argument that the properties are not Indian Country because federal set aside and superintendence

[12] The issue in the case was whether the state could impose sales tax on sales made by Indians to Indians and non-Indians on tribal trust lands. Id. at 507, 111 S.Ct. at 908.

have not been shown fails. The federal government confirmed and guaranteed the Oneidas' Reservation by the Treaty of Canandaigua in 1794. Federal set aside and superintendence are inherent in that Reservation. Thus, even if it is said that such requirements apply, however doubtful that is in the case of formal reservations, then those requirements are met at the time the reservation is established. In this case, therefore, the federal set aside and superintendence requirements were met as of 1794.

Additionally, to the extent that the argument contends that fee simple title to land precludes Indian Country status it also fails. The Supreme Court has found that Indian Country status is not precluded because the Indians hold fee simple title to land. *See Sandoval*, 231 U.S. at 48, 34 S.Ct. at 6 (rejecting argument that Indian Pueblo lands, held in fee simple by the Pueblo, cannot be Indian Country due to the fee simple title).

In reply, Sherrill extends its argument citing the ruling of April 11, 2001 (McCurn, J.), that the remedy of ejectment of current title-holders of the land that it claims is not available to the Nation. Sherrill argues that this holding, that the Nation does not have a current possessory right to the land claimed, defeats any claim it has to possession of the lands prior to purchase of fee title. Thus, Sherrill contends, the Nation cannot establish Indian title to the land or that the properties are reservation land or Indian Country.

Sherrill's argument ignores the basis for the land claim action: denial of the Nations' ancestral possessory right to the land. The argument also ignores the question upon which Judge McCurn's ruling was made: what remedies might be available to the Nation should it prove its wrongful dispossession claim. *See Oneida Indian Nation*, 199 F.R.D. at 90. The parameters of the ruling are clear: "To the extent that the Oneidas in this particular case eventually may be

able to establish that they have possessory rights in the claim area, such rights do not necessarily encompass the concomitant right to obtain relief directly from the current landowners." *Id.* This ruling, therefore, does not limit the Nations' pursuit of claims to possessory rights to the land. Accordingly, it does not estop the Nation from asserting ancestral possessory rights in the properties at issue here, nor does it negate the existence of a reservation. To the contrary, the ruling recognizes the Nations' right to pursue claims of possessory rights to its ancestral lands. *Id.*; *see also Oneida II*, 470 U.S. at 236, 105 S.Ct. at 1252 (holding "that the Oneidas can maintain this action for violation of their possessory rights based on federal common law."). The Supreme Court, while recognizing the Oneidas' possessory rights claim, left open whether equitable considerations might limit the available relief. *Oneida II*, 470 U.S. at 254 n. 27, 105 S.Ct. at 1262 n. 27. Judge McCurn's ruling did not foreclose the Oneidas' possessory claim; rather, he limited the relief available by foreclosing the possibility of ejectment of current landowners in the land claim area and recovery of monetary damages from current landowners. *See Oneida Indian Nation*, 199 F.R.D. at 90-94.

Also in reply Sherrill argues that the Reservation has been diminished. Sherrill contends that factors such as subsequent treatment and the pattern of settlement in the area in question must be considered in deciding whether a reservation has been diminished, in addition to congressional action. Sherrill cites *Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, and *Solem*, 465 U.S. 463, 104 S.Ct. 1161, in support of this argument. Sherrill concedes that as surplus land act cases, these cases may not be "directly pertinent" here. (*See* Sherrill Reply Mem. at 4 n. 4, 17 n. 12.) However, Sherrill avers that the cases contradict the Nation's assertion that only congressional action may diminish a reservation. This averment is incorrect. In fact, only congressional action may diminish or disestablish a reservation. 25 U.S.C. § 177;

Cayuga Indian Nation, 667 F.Supp. at 944 (citing *Oneida II*, 470 U.S. at 247-48, 105 S.Ct. at 1258); *Narragansett Indian Tribe*, 89 F.3d at 914.

The surplus land act cases involved interpretation of congressional acts.[13] *See, e.g., Yankton Sioux Tribe*, 522 U.S. at 343-344, 118 S.Ct. at 798; *Solem*, 465 U.S. at 464, 104 S.Ct. at 1163; *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 111, 118 S.Ct. 1904, 1908, 141 L.Ed.2d 90 (1998); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585-86, 97 S.Ct. 1361, 1362, 51 L.Ed.2d 660 (1977); *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 427-28, 95 S.Ct. 1082, 1084, 43 L.Ed.2d 300 (1975); *Mattz v. Arnett*, 412 U.S. 481, 497, 93 S.Ct. 2245, 2254, 37 L.Ed.2d 92 (1973); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 354, 82 S.Ct. 424, 426, 7 L.Ed.2d 346 (1962). For example, in *Yankton Sioux Tribe* the Supreme Court stated: "Our touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose." 522 U.S. at 343, 118 S.Ct. at 798. The Court further stated that "although the most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands, we have held that we will also consider the historical context surrounding the passage of the surplus land Acts, and to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there." *Id.* at 344, 118 S.Ct. at 798 (internal quotations omitted).

It is thus clear that evaluation of the subsequent treatment and the pattern of settlement is relevant only where needed to determine congressional intent. Where, as here, there is no congressional act, congressional intent is irrelevant and the

[13] The acts allotted Indian lands to individual Indians or to the tribe for common tribal purposes, and opened unallotted lands to white settlers.

subsequent treatment and the pattern of settlement are also irrelevant.

Sherrill, joining the amici curiae, argues that the 1838 Treaty of Buffalo Creek, a purported act of Congress, disestablished the Reservation. Oneida Ltd., the Counties, and New York State, as amici curiae, develop this argument. First Oneida Ltd. contends that the Treaty of Buffalo Creek plainly and unambiguously disestablished the Reservation. It next contends that even if the Treaty of Buffalo Creek is determined to be ambiguous, the contemporary historical context; subsequent congressional and administrative references to the reservation from the time of the claimed disestablishment until the present; historic demographic trends; the jurisdictional history of federal, state, and tribal exercises of sovereignty over the lands in dispute; and the justifiable expectations of the people living in the area are relevant and lead to the conclusion that the Reservation no longer exists.

The 1838 Treaty provided for the removal of several tribes of New York Indians from their lands in Wisconsin to territory west of the Mississippi River in what is now the State of Kansas. 7 Stat. 550. The Treaty created a reservation for the tribes in Kansas. *Id.* Art. 2. A relatively small piece of land was reserved for them in Wisconsin, while the Indians ceded the majority of their Wisconsin lands to the federal government. *Id.* Art 1. A small payment was to be made to the tribes upon their relocation to Kansas. *See New York Indians*, 170 U.S. at 3, 18 S.Ct. at 531-32. In addition to other provisions not relevant here, the Treaty provided for a payment to Oneidas still residing in New York for "expenses incurred and services rendered" by the Oneidas in securing the Wisconsin reservation.[14] 7 Stat. 550 Art. 13. Moreover,

[14] This provision was presumably included because the New York Oneidas would no longer be able to take advantage of payments previously guaranteed upon their removal to the

the New York Oneidas "agree[d] to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida [New York]." *Id.*

It is the removal language that Oneida Ltd. argues plainly and unambiguously disestablished the Reservation. It argues that in every disestablishment or diminishment case of which it is aware, the tribe was permitted to remain on at least a part of the reservation, and in fact, it was anticipated that some members of the tribe would remain on the prior reservation land. Under this removal treaty, however, it argues that the Oneidas still residing in New York were obligated to remove from New York. Accordingly, Oneida Ltd. argues that this obligation to remove clearly terminated the New York Reservation. It argues that to hold otherwise would be contrary to the historical concept of removal.

An obligation to remove does not constitute abandonment of tribal sovereignty over the land from which the Indians are to remove, contrary to the arguments of Oneida Ltd. Rather, the actual language of the congressional act in question, in this case the Treaty of Buffalo Creek, must clearly and unambiguously indicate the intent to disestablish or diminish the reservation. *Cayuga Indian Nation*, 667 F.Supp. at 944 (citing *Oneida II*, 470 U.S. at 247-48, 105 S.Ct. at 1258).

Specific cession language has been required in order to make a finding of reservation diminishment. For example, language that the tribe would "cede, sell, relinquish, and convey to the United States all their claim, right, title, and

Wisconsin reservation, which was significantly diminished by the Treaty of Buffalo Creek. In other words, since removal to Wisconsin was no longer a possibility for the New York Oneidas, reimbursement was being made for costs incurred by them in obtaining the Wisconsin reservation.

interest in and to all the unallotted lands" terminated reservation status. *Yankton Sioux Tribe*, 522 U.S. at 344, 118 S.Ct. at 798. The Court distinguished cases in which the language did not indicate a clear intent to diminish a reservation. Thus, where acts "declar[ed] surplus land 'subject to settlement, entry, and purchase' " congressional intent to diminish the reservation was not found. *Id.* at 345, 118 S.Ct. at 799 (quoting *Seymour*, 368 U.S. at 355, 82 S.Ct. at 426-27; *Mattz*, 412 U.S. at 501-02, 93 S.Ct. at 2256-57). The Court also refused to "read a phrase authorizing the Secretary of the Interior to 'sell and dispose' of surplus lands" as cession language. *Id.* (quoting *Solem*, 465 U.S. at 472, 104 S.Ct. at 1167.)

In contrast to the cession language in *Yankton Sioux Tribe*, the Treaty of Buffalo Creek simply states an agreement to remove to Kansas. The language of Article 13 cannot be read as clearly and unambiguously ceding the Oneidas' New York lands. *See* 7 Stat. 550 Art. 13; *Yankton Sioux Tribe*, 522 U.S. at 344, 118 S.Ct. at 798. To the contrary, the language clearly and unambiguously is not cession language. *See Yankton Sioux Tribe*, 522 U.S. at 344-45, 118 S.Ct. at 798-99. Further, the Supreme Court has found that a fixed payment in "sum certain" language adds credence to cession language. *Id.* at 344, 118 S.Ct. at 798. In Article 13, no payment is provided; rather, the removal was only to take place "*as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida.*" 7 Stat. 550 Art. 13 (emphasis added). This language in no way bolsters the removal language to make it reflect any intent to disestablish the Reservation. There clearly is no "total surrender of tribal claims in exchange for a fixed payment" in the Treaty of Buffalo Creek related to the Oneidas' New York lands. *See Yankton Sioux Tribe*, 522 U.S. at 345, 118 S.Ct. at 799.

Also instructive is the reasoning in *New York Indians*. In that case the Supreme Court evaluated the Treaty of Buffalo Creek language to determine if it reflected an intent for the Indians to forfeit the Kansas reservation if they failed to remove there. 170 U.S. at 24-25, 18 S.Ct. at 536-37. The Court determined that the use of present tense in the granting clause meant that an immediate interest in the land was conveyed. *Id.* at 17, 18 S.Ct. at 534. The Court analyzed the cession language pertaining to the Wisconsin lands; the specific description of the Kansas lands that were to become the new reservation; the language of the habendum clause; the special provision for the New York Senecas and the sale of their land in New York; the set off of land for the Tuscaroras and the conveyance of trust land to be held for them; and determined that present title in the Kansas lands was conveyed. *Id.* at 19-21, 18 S.Ct. at 535. Because title passed to the Indians at the time the Treaty was made, a mere failure to assert title did not work a forfeiture of the title. *Id.* at 34, 18 S.Ct. at 540. Accordingly, the Court directed that a judgment be entered for the amount received by the government when it sold the lands. *Id.* at 36, 18 S.Ct. at 541.

Notably, the Supreme Court made a painstaking analysis of the Treaty of Buffalo Creek, specifically detailing its provisions. *Id.* at 15-21, 18 S.Ct. at 533-35. The Court evaluated the divestiture of New York lands by the Senecas, in Article 10, and the set off in trust of New York lands for the Tuscaroras, in Article 14. *Id.* at 21, 18 S.Ct. at 535. In discussing these articles, the Court stated: "These proceedings, by which these tribes devested themselves of their title to lands in New York" indicated the intent for the tribes to take immediate possession of the Kansas lands. *Id.* Of importance is the Court's failure to mention that any Oneida New York land was devested by this Treaty. *See id.* If Article 13 in fact worked a devestiture of the Oneidas' New York lands, it stands to reason that the Supreme Court

would have mentioned that fact when performing this detailed analysis.

The only mention of Article 13 by the Court is in a discussion of the possibility that even if a forfeiture occurred by executive action, the contingency (Indians failing to agree to remove) to affect the forfeiture had never occurred. *Id.* at 25-26, 18 S.Ct. at 537. In other words, forfeiture was conditioned "not upon the actual removal ... to Kansas," but rather upon agreement to remove. *Id.* at 26, 18 St. Ct. at 537. The Court cited Article 13 as signifying the Oneidas' agreement to remove, thus technically performing the condition precedent. *Id.*

Oneida Ltd. argues that no court has found tribal sovereignty surviving an obligatory removal treaty, and contends that to do so would "logically open up over 100 million acres of lands east of the Mississippi River" to claims of "ongoing tribal sovereignty, jurisdiction, and regulatory authority over the lands, waters, natural resources, and peoples within these areas." (Oneida Ltd. Mem. at 15.) It is this type of contention that "engenders inflamed passions on all sides." *Oneida Indian Nation*, 199 F.R.D. at 65. Moreover, the contention is baseless. It has been determined that ejectment, or in other words recovery of actual possession, of the Reservation lands is not a viable remedy in the Oneidas' land claim action. *Id.* at 90. It may be that courts would also determine that such a remedy is not viable in similar suits in other areas. It is also well settled that tribal jurisdiction is limited to Indians and Indian land, and the state retains jurisdiction over non-Indians and land which is not Indian Country. *See Sac & Fox Nation*, 508 U.S. at 128, 113 S.Ct. at 1993; *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 513, 111 S.Ct. at 911. Further, non- Indian communities even within the boundaries of a reservation are not Indian Country, *Weddell v. Meierhenry*, 636 F.2d 211, 213 (8th

Cir.1980), so there would be no dispute over applicable jurisdiction.

Oneida Ltd. cites *Menominee Indian Tribe v. Thompson*, 161 F.3d 449 (7th Cir.1998), in support of its contention that obligatory removal treaties always extinguish rights to the lands from which the Indians agree to remove. The Menominee Tribe ceded their lands around the Fox River in Wisconsin by treaty in 1831. *Id.* at 458. The 1831 Treaty also preserved the Menominees' right to fish and hunt on certain portions of the ceded land, without interference or regulation by the state. *Id.* In 1848 the Tribe entered into another treaty, ceding all of its lands in Wisconsin, obtaining new lands in Minnesota, and agreeing to remove to Minnesota. *Id.* The court found that the Menominees had unambiguously ceded all of its Wisconsin land, including the previously reserved rights to hunt and fish near the Fox River. *Id.* at 457-58. In following the canon of construction that treaties must be interpreted as the Indians would have understood them, the court noted that the Menominees "could not reasonably have expected to continue hunting and fishing on the land ceded in 1848, considering the Tribe had just agreed to leave the Wisconsin land and move to the Minnesota reservation approximately 300 miles away." *Id.* at 458.

The cession language in the Menominees' 1848 Treaty, "agree to cede, and do hereby cede, sell, and relinquish to the United States all their land in the State of Wisconsin wherever situated," was clear and unambiguously reflected an intent to relinquish all rights to the Wisconsin land. *Id.* In contrast, the Treaty of Buffalo Creek language, "agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida," contains no cession language. Accordingly,

Menominee Indian Tribe is not helpful to Oneida Ltd.'s argument.

More closely analogous are *New York Indians* and *Donnelly*. In *New York Indians*, the Supreme Court found that the New York Indians' refusal to remove to the new territory did not devest them of the rights to the new reservation. 170 U.S. at 34-35, 18 S.Ct. at 540-41. In *Donnelly*, it was argued that creation and maintenance of a school district on a reservation changed the status of the land. 228 U.S. at 267, 33 S.Ct. at 457. The Supreme Court found that the existence of the county school district had no significance in its evaluation of Indian Country status. *Id.* at 267-68, 33 S.Ct. at 457. Here, an agreement to remove cannot be construed as relinquishment of rights in land.

Even if the Treaty of Buffalo Creek is considered an obligatory removal treaty, absent cession language it cannot be construed as ceding the Nation's New York lands. *See, e.g., Yankton Sioux Tribe*, 522 U.S. at 344, 118 S.Ct. at 798; *see also Menominee Indian Tribe*, 161 F.3d at 458 (interpreting "to cede, and do hereby cede, sell, and relinquish" as clearly ceding lands). Lacking cession language, the Treaty of Buffalo Creek unambiguously did not disestablish the Reservation. In other words, the Treaty of Buffalo Creek did not alter the reservation status of the Oneidas' New York lands. Even if the Treaty of Buffalo Creek language could possibly be considered ambiguous as to intent to affect the Oneidas' New York lands, according to the well-settled canons of construction such ambiguity must be resolved in favor of the Indians. *Oneida II*, 470 U.S. at 247, 105 S.Ct. at 1258. Further, a finding of disestablishment or diminishment must not be lightly implied. *Id.* at 248, 105 S.Ct. at 1258. Thus, with the applicable canons of construction in mind, the language of the Treaty, even if ambiguous, must be construed to have intended no disestablishment of the Oneidas' New York lands.

The amici curiae, however, argue that if the Treaty of Buffalo Creek is not considered an unambiguous relinquishment of the Reservation, then it should be considered ambiguous as to that issue. The amici then point to the force of time and law in an attempt to find congressional intent to disestablish or diminish the Reservation. Given that the unambiguous language of the Treaty clearly does not indicate relinquishment of the New York land, it would not be proper to rely upon demographics and jurisdictional history to find disestablishment. *Hagen v. Utah*, 510 U.S. 399, 440-41, 114 S.Ct. 958, 980, 127 L.Ed.2d 252 (1994) (Blackmun, J., dissenting) ("Absent other plain and unambiguous evidence of a congressional intent, we never have relied upon contemporary demographic or jurisdictional considerations to find diminishment."). To find that the historical context and demographics indicate congressional intent to disestablish the Reservation with absolutely no language whatsoever in the Treaty that could possibly be read to infer such intent flies in the face of the law, as well as logic and common sense. Here, the Treaty language is not ambiguous and therefore considering historical context and demographics is not warranted.

However, several arguments of the amici deserve mention. Oneida Ltd. posits that historical, equitable, and practical concerns require a finding against the Nation. It seems that this argument calls for ignoring the law and succumbing to political pressures. As noted above, it is in the purview of the executive and legislative branches, not the judiciary, to make such determinations. *See Cherokee Nation*, 174 U.S. at 483, 19 S.Ct. at 736.

Oneida Ltd. further suggests that a finding in favor of the Nation would upset the justifiable expectations of 70,000 non-Indian residents in the area. As previously noted, such scare tactics will be to no avail in this forum. Moreover, they

are groundless, as any decision rendered in this action will apply narrowly to the parcels at issue in the lawsuit, which are currently possessed by the Nation. If a finding is made that those parcels constitute a viable reservation and are Indian Country, then by definition they are inalienable by the Nation without the approval of the federal government. (*See* First Carmen Aff. Ex. 12-15.) Tribal jurisdiction will apply only on the parcels affected by the decision. Further, any decision rendered here will apply to the Nation and not to any private landowners.

Amici present statistics and evidence to show that historically for many years the state has asserted jurisdiction over the area and the area is populated by many non-Indians and few Indians. This evidence is set forth to support the argument that the force of time and law has *de facto* diminished the Reservation. The Supreme Court has recognized that although settlement by non-Indians may degrade the Indian character of a reservation, that is not necessarily determinative of whether the reservation status of the lands has changed. *See Yankton Sioux Tribe*, 522 U.S. at 336, 118 S.Ct. at 804.

The reliance on this historical data also exhibits logical faults. Out of aboriginal lands of six million acres, the Reservation originally created consisted of 300,000 acres. Approximately 100,000 acres were illegally purchased by New York State in 1795. *See Oneida II*, 470 U.S. at 229-33, 105 S.Ct. at 1249-50. Approximately twenty-five other allegedly illegal purchases are at issue in the land claim litigation.

First, by the time of the 1838 Treaty of Buffalo Creek, the Oneidas only retained 5,000 acres. To say, as Sherrill and the amici wish, that the 1838 Treaty disestablished a reservation of 300,000 acres, when at the time the Oneidas entered into the Treaty they possessed only 5,000 acres,

defies logic. How possibly could those Oneidas have intended to relinquish their rights to 295,000 acres when they did not know they had such rights?

Second, the Oneidas had been dispossessed of most of their land, they claim illegally, by the time periods for which demographic and jurisdictional evidence is presented. The reason that non-Indians settled on the land and the state asserted jurisdiction was because the Oneidas had been dispossessed, possibly illegally. How can this be considered as evidence of congressional intent to disestablish the Reservation?

Another argument is that the federal policy at the time, 1838, was to remove the Indians from the east to the territories in the west. This policy, New York State argues, supports the construction of the Treaty of Buffalo Creek as a whole to reflect the intent to disestablish the Oneidas' New York Reservation. However, reading the Treaty as a whole indicates that when there was an intent to cede land, the language clearly so stated. For example, Article 1, in reference to the Wisconsin reservation previously acquired for the New York Indians from the Menominees, states that the Indians "cede and relinquish to the United States all their right, title and interest to the lands" in Wisconsin. 7 Stat. 550 Art. 1. Article 2 provides the consideration for the cession of Article 1. *Id.* Thus, had the parties to the Treaty of Buffalo Creek intended a cession of the Oneida land in New York, the language to use to do so was known to them and at their disposal. *See Mattz*, 412 U.S. at 504 & n. 22, 93 S.Ct. at 2257-58 & n. 22 (discussing examples of clear language of express termination). Moreover there is no legal authority for interpreting a treaty as relinquishing rights to Indian lands based solely on federal policy, in the complete absence of cession language in the treaty.

New York State relies upon *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832), in support of the argument that jurisdictional conflicts between the state and tribal authorities was a problem that the removal policy sought to eliminate. In *Worcester*, the Supreme Court found that the Cherokee Nation maintained sovereignty over its peoples and lands, and that Georgia's assertions of jurisdiction in contravention of such sovereignty were void. *Id.* 31 U.S. at 561. The Court reasoned that the Constitution, in conferring upon Congress the power of making treaties and regulating commerce with the Indian tribes, left the sole right of dealing with the Indians in the federal government, thereby precluding a state from unilaterally asserting jurisdiction over the Indians. *Id.* at 558-61. The Court noted that the states

> acquiesc[ed] in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent: that their territory was separated from that of any state within whose chartered limits they might reside, by a boundary line, established by treaties: that, within their boundary, they possessed rights with which no state could interfere: and that the whole power of regulating the intercourse with them, was vested in the United States.

Id. at 560. New York State reasons from *Worcester* that, as reservation status and jurisdiction went hand in hand, by obligating the Oneidas to remove from New York, there was an intent to terminate tribal jurisdiction and thereby disestablish the Reservation. This argument and reasoning completely ignores the message of *Worcester* that only the federal government has the authority to terminate the tribal jurisdiction and disestablish a reservation. It ignores all of the canons developed by the Supreme Court for making determinations of congressional intent when dealing with Indians, such as requiring plain and unambiguous expression

of intent to terminate Indian title. *See, e.g., Oneida II*, 470 U.S. at 247-48, 105 S.Ct. at 1258. It ignores the overriding federal policy of protecting the Indians and their lands. *See, e.g., id.*

> These Indian tribes are the wards of the nation.... From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.... The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.

United States v. Wright, 53 F.2d 300, 305 (4th Cir.1931) (quoting *United States v. Kagama*, 118 U.S. 375, 383-85, 6 S.Ct. 1109, 1114, 30 L.Ed. 228 (1886)). It also ignores the simple definition of remove. Remove does not mean terminate.

In sum, the Nation has set forth undisputed evidence that the 1794 Treaty of Canandaigua confirmed and guaranteed its Reservation, which encompasses the lands at issue here. There is no evidence of any congressional act that disestablished the Reservation between 1794 and the present day. Accordingly, this land is Indian Country and is not taxable by Sherrill and the Counties.

D. ***Application of Indian Country Finding***

1. ***Lead Case***

a. ***Sherrill's Motion for Summary Judgment or Alternative Injunctive Relief***

Sherrill contends it is entitled to summary judgment solely based upon the properties at issue being found not to be Indian Country pursuant to § 1151. Because it has been found that the properties are Indian Country, Sherrill's motion for summary judgment must be denied.

In the alternative Sherrill seeks a preliminary injunction maintaining the status quo ante. Sherrill wishes to enjoin the Nation from purchasing additional properties or expanding the properties it currently owns.

A preliminary injunction should issue only where the party seeking such relief shows "that it is likely to suffer irreparable injury if relief is denied [and] also that there is either (1) a likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation, with a balance of hardships tipping decidedly in the [movant's] favor." *Procter & Gamble Co. v. Chesebrough-Pond's Inc.*, 747 F.2d 114, 118 (2d Cir.1984); *Otokoyama Co. v. Wine of Japan Import*, Inc., 175 F.3d 266, 270 (2d Cir.1999).

Sherrill argues that absent an injunction it is in imminent danger of losing its tax base and its power to govern the property owners within the City. Sherrill posits irreparable harm will result from its inability to collect property tax or sales tax from the businesses already operated by the Nation, and from it being forced to provide municipal services to homes and business that do not contribute to the tax base.

The Counties, as amicus curiae, also contend that absent injunctive relief harm will be irreparable. The Counties assert that the Nation's purchases of land are accelerating, it having purchased 13,000 acres since 1987. As the Nation acquires more land, the tax base shrinks. The Counties argue that the resulting shortfalls in tax revenue will cause deficiencies in public services to the citizenry, including law enforcement, emergency services, and highway maintenance. The Counties further claim harm from the Nation's assertion of sovereignty over the land, asserting that irreparable damage to the body politic will result from a checkerboard jurisdictional pattern.

Both Sherrill and the Counties contend that, additionally, the harm is irreparable because the Nation's sovereign immunity will insulate it from any claim for damages in the future. While this may be true, it is irrelevant unless Sherrill can establish harm.

Sherrill's contention that it is on the verge of extinction is exaggerated. Sherrill has had budget surpluses for the last five years. (First Carmen Aff. Ex. 31.) Sherrill retorts that each year its surplus becomes less and less. Sherrill's financial condition is not indicative of being on the brink of bankruptcy, and is not supportive of a claim of irreparable harm.

Also failing to establish irreparable harm are the arguments made by Sherrill and the Counties that the fact that Nation land does not contribute to the tax base causes deficiencies in services such as law enforcement and fire protection. First, neither Sherrill nor the County cites to a particular instance, or even to general circumstances, where some budget shortfall caused by the Nation's refusal to pay property tax resulted in failure by the municipalities to provide municipal services. Second, over $30 million worth of Sherrill property is tax exempt, not including the Nation property at issue here,

which may account for some budget shortfall. (First Carmen Aff. Ex. 32.)

Sherrill has not adequately shown irreparable injury in order to entitle it to preliminary injunctive relief. *See Otokoyama Co.*, 175 F.3d at 270. Further, based upon the foregoing finding that the properties are Indian Country, Sherrill has failed to show a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation, with a balance of hardships tipping decidedly in Sherrill's favor. *See id.* Accordingly, Sherrill's request for alternative preliminary injunctive relief must be denied.

b. *Nation's Cross-motion for Summary Judgment*

The Nation cross moves for summary judgment on its taxation claim, its due process claim, and Sherrill's counterclaims against it.

(1) *Taxation Claim*

The basis for the Nation's taxation claim is that the property is Indian Country and therefore is not taxable. Based upon the finding that, as a matter of law, the properties at issue are Indian Country and thus are not taxable, the Nation is entitled to judgment on that claim.

Sherrill argues that summary judgment cannot be granted in favor of the Nation, as it rests upon a number of disputed factual assertions, for which additional discovery is required. Sherrill suggests that at dispute are (1) whether the properties are within the Reservation boundaries confirmed by the Treaty of Canandaigua; (2) circumstances regarding transfers of the properties from 1794 until the present day including possible federal governmental approval; (3) whether the 1805 and 1807 transactions referenced by the

Nation actually encompasses the properties; (4) whether the Nation has maintained continuous tribal status since 1794, for the purposes of the Nonintercourse Act; (5) the circumstances surrounding the government's alleged recognition of land referenced in the Carmen Aff. Ex. 13-15; (6) whether the Nation's claim is factually barred by laches, estoppel, waiver, statute of limitations, unclean hands, or consent; (7) whether there was ratification of transfers that the Nation claims are invalid; and (8) whether the 1838 Treaty of Buffalo Creek or other treaties extinguished the 1794 Reservation. Sherrill relies upon Fed R. Civ. P. 56(f), which provides

> *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The documents and depositions into which Sherrill posits that it needs additional discovery point out the illusorious nature of its contention that discovery is now required on these points. For example, Sherrill avers that it needs discovery of documents and expert depositions relating to whether the proprieties are within the 1794 Treaty boundaries. (Sacks Aff. ¶ 4.) Any such documents are a part of the public record and thus readily available for Sherrill to cite in opposition to the Nation's cross motion. It is also notable that the Nation adduced expert evidence that in fact the properties are within the 1794 Treaty boundaries. (*See* Thomas Decl.) Sherrill also avers the need for discovery of documents and expert depositions relating to whether Congress has ratified or otherwise modified, eliminated, or terminated the 1794 Treaty. (Sacks Aff. ¶ 4.) The Congressional Record is and

has been available for Sherrill to determine if Congressional action regarding the Reservation has occurred since 1794. Permitting it further discovery into these areas would not be permissible pursuant to Rule 56(f), as such discovery was available prior to the time the motion was briefed.

Sherrill further contends that it requires discovery regarding the 1805 and 1807 transfers of the properties in question. (Sacks Aff. ¶ 5.) The Nation has adduced evidence that these transfers did involve the properties in question. (*See* Thomas Decl.) In order to withstand summary judgment on this point, Sherrill must do more than conclusorily assert the need to look for additional documentation on these transfers. In a similar manner Sherrill contends that it needs additional discovery to determine whether the Nation in fact has enjoyed continuous tribal status since 1794, a prerequisite for protection of the Nonintercourse Act. (Sacks Aff. ¶ 7.) However, Sherrill has adduced no facts to indicate that the Nation has not enjoyed such status, in the face of significant factual support in favor of the Nation's continued tribal status. Sherrill in no way indicates the reason for its failure to adduce opposing facts, nor how any delay would help it to do so. For example, Sherrill does not state what documents, nor even what type of documents, may provide facts that would create a question as to whether the Nation has maintained continuous tribal status. In a similar manner Sherrill fails to state a reason for its failure to have other facts available that are essential to its opposition.

Sherrill does mention what it considers an inadequate response to interrogatories posed to the Nation. (Sacks Aff. ¶ 12.) However, Sherrill does not include a reference in the record to the interrogatories and responses such that they could be considered in determining what additional discovery may be warranted by any inadequate responses. *Id.* Additional discovery pursuant to Fed.R.Civ.P. 56(f) is not warranted in these circumstances.

(2) *Due Process Claim*

In its due process claim the Nation avers that the original notice of the tax delinquency and potential tax sale was insufficient in that it did not identify specific parcels that were to be subject to tax sale, and that newspaper publication of the redemption period was insufficient because it was not personal service and it was not timely. Further, the Nation argues that personal notice served on the Nation a short time before the expiration of the redemption period was untimely. In opposition, Sherrill contends that the Nation had ample actual notice of the foreclosures and sales, and that the Nation did not have and will not have in the future any intention of paying the assessed taxes or redeeming the properties.

Due process requires that notice of a tax sale be mailed to a property owner whose name and address are known. *McCann v. Scaduto*, 71 N.Y.2d 164, 176, 524 N.Y.S.2d 398, 519 N.E.2d 309 (N.Y.1987). Notice by publication is insufficient. *Id.* at 175-76, 524 N.Y.S.2d 398, 519 N.E.2d 309. Notice by mail of a redemption period is also required. *Yagan v. Bernardi*, 256 A.D.2d 1225, 1226, 684 N.Y.S.2d 117 (4th Dep't 1998). Providing notice by mail closer to the expiration period than the regulatory scheme provides does not comport with due process. *Id.*; *McCann*, 71 N.Y.2d at 177-178, 524 N.Y.S.2d 398, 519 N.E.2d 309. The notice must sufficiently describe the property such that the property can be found. *Kiamesha Dev. Corp. v. Guild Props.*, Inc., 4 N.Y.2d 378, 387, 175 N.Y.S.2d 63, 151 N.E.2d 214 (N.Y.1958). A description which permits identification and location of the property with reasonable certainty is adequate. *S.A.B. Enters., Inc. v. Stewart's Ice Cream Co.*, 187 A.D.2d 875, 876, 590 N.Y.S.2d 568 (3d Dep't 1992). Finally, "the nature of tax sales is such that the owner's title should not be divested unless the statutory requirements are 'strictly

observed.' " *Kiamesha Dev. Corp.*, 4 N.Y.2d at 389, 175 N.Y.S.2d 63, 151 N.E.2d 214 (quoting *Helterline v. People*, 295 N.Y. 245, 251, 66 N.E.2d 345 (1946)).

On August 7, 1997, Sherrill mailed to the Nation three notices of tax delinquency. (First Carmen Aff. Ex. 17.) None of the three notices specified any description whatsoever of properties to which the delinquencies pertained. *Id.* Such notices, with no description of the property affected, do not provide due process. *See Kiamesha Dev. Corp.*, 4 N.Y.2d at 387, 175 N.Y.S.2d 63, 151 N.E.2d 214; *S.A.B. Enters., Inc.*, 187 A.D.2d at 876, 590 N.Y.S.2d 568. Sherrill published a notice of tax sale for these properties; however, it did not provide notice to the Nation of the impending sale. The tax sale was held on November 5, 1997. According to the Sherrill Charter, a two-year redemption period would follow the tax sale. Sherrill's notice by publication in November 1999, of the upcoming February 8, 2000, expiration of the redemption period, was untimely. On January 10, 2000, Sherrill personally served notice on the Nation of the expiration of the redemption period. The one-month notice of the expiration of the redemption period is insufficient to comport with due process. *See McCann*, 71 N.Y.2d at 177-178, 524 N.Y.S.2d 398, 519 N.E.2d 309; *Yagan*, 256 A.D.2d at 1226, 684 N.Y.S.2d 117. Similarly, Sherrill's notices to the Nation on March 6, 2000, of impending redemption period expiration dates of November 5, 2000, and November 10, 2000, failed to provide the Nation due process. *See McCann*, 71 N.Y.2d at 177- 178, 524 N.Y.S.2d 398, 519 N.E.2d 309; *Yagan*, 256 A.D.2d at 1226, 684 N.Y.S.2d 117.

Sherrill cites *Greaney v. Springer*, 266 A.D.2d 707, 701 N.Y.S.2d 450 (3d Dep't 1999), in support of its argument that because the Nation actually knew of the foreclosures and tax sales, technical deficiencies in Sherrill's notice to the Nation should not render the tax sales invalid. In *Greaney*,

the plaintiffs argued that notices received in 1993 and 1994 were legally insufficient because there was no mention of a sale. 266 A.D.2d at 708. The *Greaney* Court found this argument meritless because plaintiffs had indisputably been given notice of the impending sale in 1996. *Id.* The plaintiff's argument that lack of a specific sale date on the 1996 notice rendered the notice invalid was also rejected, because the sale was actually postponed, at plaintiffs' request, for approximately seven months to afford them a chance to pay the delinquency before the sale. *Id.*

Greaney is distinguishable on two grounds. First, the technical deficiencies, rejected as a basis for setting aside the tax sale, were relatively minor when looking at all the circumstances. For example, the tax sale was not set aside because earlier notices did not mention the possibility of a sale when a later notice clearly did notify plaintiffs of the sale. 266 A.D.2d at 708. In this case a claimed deficiency was that notices of delinquency failed to identify any properties that could become subject to a tax sale. Another claimed deficiency in this case was that a two-year redemption period was cut down to two months in one instance and less than two years in all instances. These are not minor technicalities. Second, there was no question in *Greaney* that the municipality provided notice to the plaintiffs and actually postponed the sale at their request. *Id.* Here, however, one of the major complaints is lack of notice, in particular of the expiration of the redemption period, in any timely manner. Accordingly, *Greaney* is not controlling under the facts of this case.

Sherrill cites no other authority that would excuse its failure to provide due process. Sherrill does posit that even if due process was not provided, the only remedy available to the Nation is an additional time period within which to pay its delinquent taxes. *See McCann*, 71 N.Y.2d at 178, 524 N.Y.S.2d 398, 519 N.E.2d 309.

The Nation's remedy for the due process violations in the tax sales is to void the tax sales, declare the deeds a nullity, and provide it an opportunity to redeem the properties. *Id.* Opportunity to redeem the properties is not a viable remedy here, however, as it has been determined that Sherrill had invalidly assessed the taxes on sovereign land. Accordingly, the Nation's remedy should also include a declaration that the tax assessments, delinquencies, and sales are null and void.

(3) *Counterclaims*

The Nation seeks summary judgment on Sherrill's counterclaims as well. The Nation contends that the counterclaims are barred by sovereign immunity. Sherrill argues that the Nation has not made the requisite showing that it is a federally recognized Indian tribe, and therefore this motion must be denied. However, the record is replete with evidence showing the Oneidas to be a federally recognized Indian tribe, protected by sovereign immunity. Case law also exists to that effect. *See, e.g., Oneida Indian Nation*, 434 F.Supp. at 538. Sherrill has admitted that it is a federally recognized Indian tribe. (Ans.¶ 5.) Sherrill cannot now contend that the Nation is not a federally recognized tribe possessing the protection of sovereign immunity.

Sherrill further argues that it would be fundamentally unfair to apply the doctrine of sovereign immunity where, as here, the sovereign brought claims against the party in federal court but claims immunity from the party's counterclaims. Sherrill argues that on this basis the Nation should be estopped from asserting sovereign immunity as a defense. However, Sherrill cites no law to support this argument. In fact, this is not the law. Rather, an Indian tribe is protected, by sovereign immunity, from compulsory counterclaims in a suit it has brought in federal court. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 509-10, 111 S.Ct. at 909 (rejecting

the state's argument that by bringing the suit to enjoin the state from assessing its sales tax, the tribe waived its sovereign immunity). Thus, the Nation is not estopped from asserting sovereign immunity as an affirmative defense.

Accordingly, Sherrill's counterclaims are barred by the Nation's sovereign immunity. The Nation is entitled to summary judgment on its taxation and due process claims. It is further entitled to summary judgment dismissing the counterclaims brought against it.

c. *Sherrill's Motion to Amend its Answer*

Sherrill seeks permission to amend its answer to assert the following affirmative defenses: laches, promissory and equitable estoppel, waiver, statute of limitations, ratification, and *in pari delicto*. The Nation contends that such amendment would be futile.

Leave to amend a complaint should be freely given. Fed.R.Civ.P. 15(a). Several factors may be considered when determining whether to permit an amendment. *Nerney v. Valente & Sons Repair Shop*, 66 F.3d 25, 28 (2d Cir.1995); *Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 234, 235 (2d Cir.1995). Normally in the absence of " 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment' " leave to amend should be granted. *Rachman Bag Co.*, 46 F.3d at 234 (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). Undue delay or futility of amendment, inter alia, would be grounds upon the which the amendment should be denied. *Nerney*, 66 F.3d at 28.

The equitable doctrine of laches bars lawsuits brought after inordinate delay. *See Oneida II*, 470 U.S. at 244-45, 105 S.Ct. at 1256- 57; *Oneida Indian Nation*, 434 F.Supp. at 541-42. Laches, however, is not an available defense in actions brought by Indians, or by the United States on behalf of Indians, to protect their rights to their lands. *Oneida Indian Nation*, 434 F.Supp. at 541-42; *Seneca Nation of Indians v. State of New York*, No. 93-CV-688A, 1994 WL 688262, at *2 (W.D.N.Y. Oct.28, 1994); *see also Oneida II*, 470 U.S. at 244-45 & n. 16, 105 S.Ct. at 1256-57 & n. 16 (explaining that although the issue was not before the Court, it is doubtful that laches would bar such a suit). This is so due to the special trust relationship between the government and the Indians, and the federal statutory protection against the alienation of Indian land without congressional action. *Oneida Indian Nation*, 434 F.Supp. at 541-42; *see also Oneida II*, 470 U.S. at 244-45 & n. 16, 105 S.Ct. at 1256-57 & n. 16.

> And in respect to the rights of Indians in an Indian reservation, there is a special reason why the Indians' property may not be lost through adverse possession, laches or delay. This ... arises out of the provisions of Title 25 U.S.C.A. § 177, R.S. § 2116, which forbids the acquisition of Indian lands or of any title or claim thereto except by treaty or convention.

Oneida Indian Nation, 434 F.Supp. at 542 (quoting *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 334 (9th Cir.1956)) (internal citation omitted). Sherrill cites no contrary authority. Accordingly, it would be futile to permit Sherrill to amend its answer to add the affirmative defense of laches.

Sherrill argues that waiver and promissory and equitable estoppel are also viable defenses. Sherrill contends that the Nation's claim to the land "since time immemorial" is

inconsistent with open market purchases and therefore waiver and estoppel are valid defenses. However, the same federal policy of protecting the Indians and their rights to their land that precludes a defense of laches also precludes waiver and estoppel defenses. *See Seneca Nation of Indians*, 1994 WL 688262, at *2. Again, Sherrill cites no authority for its proposition that these defenses are available in a claim by Indians relating to their rights to their land free from taxation. Amending Sherrill's answer to add the defenses of waiver and estoppel would be futile.

The *in pari delicto* defense applies where there is mutual wrongdoing, giving rise to a supposition in favor of the defending party. *Peltz v. SHB Commodities, Inc.*, 115 F.3d 1082, 1089-90 (2d Cir.1997). Here there is no asserted wrongdoing on the part of either party. Rather, it is simply a matter of whether the properties in question are taxable by Sherrill. As Sherrill states, the only question here is whether the properties are Indian Country. The *in pari delicto* defense is not applicable. Any amendment to add this defense would be futile.

No statute of limitations governs actions by Indians to enforce property rights. *Oneida II*, 470 U.S. at 240, 105 S.Ct. at 1254; *Seneca Nation of Indians*, 1994 WL 688262, at *1. Thus, there would be no statute of limitations bar to an action by the Nation to enforce the right to maintain its property free from taxation by Sherrill. Sherrill cites no contrary law. Any amendment to add a statute of limitations defense would be futile.

The final defense Sherrill wishes to assert is ratification. Sherrill argues that it need not specify, prior to discovery, which of the twenty five treaties executed between 1795 and 1846 between the Oneidas and New York State it believes will show that Congress ratified the 1805 and 1807 conveyances. Ordinarily amendment of pleadings to add

available affirmative defenses would be permissible without factual support. However, here there was a pending summary judgment motion. The Nation, in support of its motion for summary judgment, adduced factual support for a finding that the properties are in fact Indian Country. (*See* Thomas Decl.) The burden then became Sherrill's to adduce sufficient facts to the contrary. A ratification defense necessarily must be based upon a congressional act. *See Oneida II*, 470 U.S. at 246-48, 105 S.Ct. at 1257-58. Further discovery is unnecessary, as the treaties have been available. Sherrill failed to meet its burden of pointing out some express language indicating congressional intent to ratify the conveyances in issue and thus change the status of the Reservation. *See id.* Accordingly, permitting Sherrill to now assert a ratification defense would be antithetical to summary judgment motion practice.

2. *Eviction Case*

The Nation also seeks summary judgment on the petition for eviction brought against it by Sherrill on the basis of sovereign immunity. As discussed above, the Nation is entitled to sovereign immunity from suit. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 509-10, 111 S.Ct. at 909. Accordingly, the Nation is entitled to summary judgment dismissing the petition for eviction.

3. *Member Case*

The Nation representatives move to stay this action pending resolution of the Lead Case; or in the alternative to dismiss the suit for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)*(6)*, and for failure to join an indispensable party pursuant to Fed.R.Civ.P. 19(b). Based upon the foregoing determination that the properties in question constitute Indian Country and are not taxable, the motion to stay is moot. Accordingly, the motion to dismiss will be addressed.

a. *Failure to State a Claim*

The Nation representatives argue that they are entitled to the same sovereign immunity as the Nation enjoys, in their official capacities. The Nation representatives also argue that Sherrill's attempts to hold them individually liable for property tax payments and sales tax collection are contrary to New York State law. Accordingly, the Nation contends that Sherrill's complaint fails to state a claim.

Sherrill argues that it is not attempting to hold the Nation representatives personally liable for the actions of the Nation or for the payment or collection of taxes; rather, it is claiming that the Nation representatives have been unjustly enriched by the Nation's failure to pay property taxes and collect state sales taxes. Sherrill further argues that sovereign immunity does not apply to individual Nation members where, as here, their acts are ultra vires. Finally, Sherrill argues that the Nation, the State, and other Sherrill landowners are not indispensable parties.

A cause of action shall not be dismissed for failure to state a claim under Fed.R.Civ.P. 12(b)*(6)*, "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). In considering a motion brought pursuant to Fed.R.Civ.P. 12(b), the court must assume all of the allegations in the complaint are true. *Id.*

A review of the complaint makes clear the nature of Sherrill's action against the Nation representatives. Sherrill seeks a declaration that it can lawfully impose and collect property taxes from the Nation representatives and that they and the Nation are in violation of state law for failure to collect and remit state sales tax on sales made to non-Indians.

Sherrill further seeks eviction, damages for unjust enrichment based upon the receipt and use of municipal services, injunctive relief prohibiting the Nation from making additional purchases of property within Sherrill, and injunctive relief prohibiting the Nation from expanding current structures or constructing new buildings on the properties. These claims mirror almost to the letter the counterclaims in the Lead Case. As has already been determined, the Nation is entitled to sovereign immunity on those counterclaims. It therefore appears that Sherrill is making the very same claims, albeit cloaked in unjust enrichment language, against the Nation representatives in an effort to avoid the sovereign immunity bar.

Sherrill relies upon *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 514, 111 S.Ct. at 912, in support of its proposition that it can sue to enforce the state sales tax and it can sue the individual Nation representatives. In that case, the Supreme Court found that the state did have the authority to enforce its sales tax on sales made to non-Indians on the reservation. *Id.* at 512, 111 S.Ct. at 911. It did not hold that a local municipality can sue to enforce the collection of sales tax imposed by the state. *See id.* Sherrill argues it is not attempting to enforce state sales tax collection. Rather, it suggests it should be able to recoup damages for the unjust enrichment of the Nation representatives obtained from their failure to collect state sales tax. Again, Sherrill attempts to avoid the bar of sovereign immunity by framing the claim as one for unjust enrichment when in fact it is clearly for the collection of state sales tax.

In *Citizen Band Potawatomi Indian Tribe*, the Supreme Court, in response to the state's argument that although it had a right to collect sales tax it had no remedy, discussed the alternatives a state might have to enforce its right to collect sales tax. *Id.* at 514, 111 S.Ct. at 912. The Court stated: "We have never held that individual agents or officers of a tribe

are not liable for damages in actions brought by the State." *Id.* (citing *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)); *see also Dep't of Taxation & Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61, 72, 114 S.Ct. 2028, 2035, 129 L.Ed.2d 52 (1994) (restating alternative remedies as set forth in *Citizen Band Potawatomi Indian Tribe*). As can be seen, the Court did not hold, as Sherrill suggests, that whenever a claim against a tribe is barred by sovereign immunity individual tribe members may be sued. Rather, the Court was suggesting that where a tribal official acts outside the law, the official may not be protected by sovereign immunity. *See Ex parte Young*, 209 U.S. at 167, 28 S.Ct. at 457; *see also Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 359 (2d Cir.2000) (explaining that a complaint seeking to impose liability on an individual tribal member must allege that the act was beyond the authority the tribe could lawfully bestow); *Yakama Indian Nation v. Washington Dep't of Revenue*, 176 F.3d 1241, 1246 (9th Cir.1999) (discussing immunity not available only when state officer acts without any authority).

Sherrill's argument rests upon the Nation's refusal to pay property taxes and to collect state sales tax as being unlawful. However, the conclusion was previously reached that the property at issue is Indian Country, and therefore the refusal to pay property taxes was in conformity with the law. As was previously noted, Sherrill has not shown any authority upon which to base its claim regarding collection of state sales tax. Thus, it cannot argue that the acts of the Nation or Nation representatives were contrary to law. Accordingly, the Nation representatives enjoy the benefit of the Nation's tribal sovereign immunity. *See Bassett*, 204 F.3d at 358.

The Nation representatives' second argument also has merit. New York State law and the Sherrill Charter set forth specific procedures for collection of property taxes. The Sherrill Charter provides only for foreclosure and sale for tax

delinquency, but not for personal liability of landowners. (First Carmen Aff. Ex. 19.) Sherrill's authority is limited by its Charter. *See Rose v. Eichhorst*, 42 N.Y.2d 92, 94, 396 N.Y.S.2d 837, 365 N.E.2d 868 (N.Y.1977). Moreover, even if the Sherrill Charter permitted landowner liability, as permitted by New York law, the Amended Complaint would not state a claim against the Nation representatives. New York law (which has not been incorporated into the Sherrill Charter) permits personal liability against an owner of property who is a resident of the city or town in which the property is assessed, if the landowner's name is correctly entered on the roll. N.Y. Real Prop. Tax L. § 926 (McKinney 2000). Sherrill's Amended Complaint does not allege that the Nation representatives are owners of the properties, reside in Sherrill, or have their names on the tax roll. Additionally, it is undisputed that the Nation, not the Nation representatives, is the owner of the property; the Nation representatives reside in Vernon, not Sherrill; and the Nation representatives' names are not on the tax roll for these properties. It is therefore clear that the Nation representatives cannot be held personally liable for the unpaid property taxes.

b. ***Failure to Join an Indispensable Party***

The Nation representatives finally contend that the Nation, New York State, and other Sherrill landowners are indispensible parties and therefore the action should be dismissed pursuant to Fed.R.Civ.P. 19(b). Sherrill argues that none are necessary nor indispensable.

A person is necessary and shall be joined as a party if

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of

> the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed.R.Civ.P. 19(a). Rule 19 further provides that in the absence of a necessary party the court must determine "whether in equity and good conscience the action should proceed among the parties before it." Fed.R.Civ.P. 19(b). The court should consider "to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provision in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; [and] fourth, whether the plaintiff will have an adequate remedy if the action is dismissed" under this rule. *Id.*

A review of Sherrill's claims and sought after relief makes clear that the Nation is an indispensable party. Sherrill seeks a declaration that the Nation representatives and the Nation are in violation of state law for failure to collect and remit state sales tax. Sherrill further seeks eviction, damages for unjust enrichment based upon the receipt and use of municipal services, injunctive relief prohibiting the Nation from making additional purchases of property within Sherrill, and injunctive relief prohibiting the Nation from expanding or constructing new buildings on the properties. The Nation is the owner of the properties at issue, thus claims a significant interest in the outcome of the action. It is also questionable to what extent relief in the Nation's absence would be adequate, since it is the Nation and not each individual Nation representative that would be directed, for

example, to refrain from further purchases. The Nation is an indispensable party under Rule 19(a). *See Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547 (2d Cir.1991).

Sherrill contends that reliance on *Fluent* is misplaced and suggests instead reliance on *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d Cir.2000). In *Bassett*, the Second Circuit reversed the district court's finding that the tribe was an indispensable party. 204 F.3d at 358. The plaintiff had sued a tribe and museum, among other defendants, for copyright infringment. *Id.* Dismissal of the tribe was required because the tribe was immune from suit. *Id.* In finding that the tribe was not an indispensable party, the *Bassett* Court reasoned that in copyright infringement actions joint tortfeasors are jointly and severally liable, and the victim need not sue each and every joint tortfeasor but may pick and choose which to sue. *Id.* Thus, a joint tortfeasor in a copyright infringement action is not an indispensable party. *Id.* In those circumstances, therefore, the important factors in the 19(b) analysis were potential prejudice in the absence of the tribe and whether an adequate remedy existed if the action were dismissed. *Id.* Because dismissal would completely deprive the plaintiff of a remedy, and since the tribe as a joint tortfeasor could not be considered indispensable, it was not within the district court's discretion to dismiss the claim. *Id.*

Here, however, the important factors are the prejudice to the Nation, which would be substantial since it is the owner of the properties at issue, and for the same reason the absence of the ability to shape the relief to lessen the prejudice to the Nation. To a lesser extent the adequacy of relief is significant. Moreover, Sherrill does not argue that deprivation of a remedy should be determinative here.

Joinder of the Nation is therefore desirable. However, the Nation enjoys the protection of sovereign immunity against such joinder. *See Fluent*, 928 F.2d at 547.

A balancing of the Rule 19(b) factors is therefore necessary. All of the relief sought would impair and impede the Nation's ability to protect its interests in the properties. Any judgment rendered in its absence would necessarily prejudice the Nation. Relief cannot be shaped in a manner to prevent or lessen that prejudice. While should the action be dismissed pursuant to Rule 19, Sherrill may be deprived of a remedy for the wrongs it alleges, "lack of a forum does not automatically prevent dismissal of the claims asserted," *Id.* Moreover, to permit the suit to continue absent the Nation would undermine federal congressional policy and contravene "the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Id.* at 548. It is again notable that it is for Congress alone to clearly and unequivocally change the federal policy of affording protection to the Indians and their lands. *See id.* at 547.

In equity and good conscience the action should not be permitted to proceed without the Nation as a party. Rather, the action must be dismissed. *See* Fed.R.Civ.P. 19(b); *Fluent*, 928 F.2d at 548. Given this conclusion, it is unnecessary to determine whether the State and Sherrill landowners would be indispensable parties without which the action should be dismissed.

4. *Related Case*

This action, as noted above, was brought by the Nation to prevent Madison County from pursuing an in rem foreclosure proceeding brought against the county properties for tax delinquencies. All the facts in the Lead Case likewise apply in this case. Moreover, as Madison County appeared as

amicus curiae in the Lead Case, it had a full opportunity to be heard on the taxation issue. Accordingly, based upon the foregoing determination that the properties at issue are Indian Country and therefore not taxable, the Nation is entitled to judgment on the pleadings. A pending motion by Madison County to dismiss the action for failure to join indispensable parties, pursuant to Fed.R.Civ.P. 19, is resolved by separate Memorandum-Decision and Order filed this day.

E. *Attorneys Fees*

A district court is authorized to award attorneys fees to a prevailing party in proceedings to vindicate civil rights. 42 U.S.C. § 1988(b); *Raishevich v. Foster*, 247 F.3d 337, 344 (2d Cir.2001). The first step in determining eligibility for such an award is whether the party seeking attorneys fees is a prevailing party. *Raishevich*, 247 F.3d at 345. Even if prevailing party status is established, however, the party is not always entitled to attorneys fees. *Id.*

Where special circumstances are present, it may be appropriate to deny attorneys fees. *Id.* at 344. Initially it must be determined "whether 'the plaintiff's claim was so strong on the merits and so likely to result in a substantial judgment that counsel in similar cases could be easily and readily retained.' " *Id.* (quoting *Kerr v. Quinn*, 692 F.2d 875, 877 (2d Cir.1982)). The apparent quality of the case at the time counsel is sought must be considered as an indication of the likelihood that counsel could be retained without the promise of a statutory award of fees. See *id.* Only if this first requirement is met will the final analysis of circumstances be undertaken in order to deny fees. *Id.* at 344-45. Where all of the circumstances, including "the award of punitive damages, the amount of the compensatory award, the degree and measurability of the harm to the plaintiff, and the public interest in the particular claim," indicate that an award of fees

" 'might work an injustice,' " such an award may be denied. *Id.* (quoting *Kerr*, 692 F.2d at 878).

Here the Nation sought only declaratory and injunctive relief. It did not seek compensatory or punitive damages. The foregoing analysis establishes that the Nation is entitled to the declaratory and injunctive relief sought. Accordingly, the Nation is a prevailing party.

Consideration of the merits of the Nation's claim at the time counsel was sought reveals that the claim was very strong on the merits and was likely to result in a judgment awarding all the relief sought. At that time there was no question that the properties were a part of the original Reservation. There was also no serious question that if the reservation status of the lands had not been changed by Congress, then the local municipalities lacked authority to tax the properties. Moreover, a search of public records, without the need for discovery, would have led to substantial confidence that no congressional changes in the status of the land had occurred. Additionally, the Nation's due process claim had clear merit in that the process Sherrill followed did not even meet the City Charter requirements. This failure to meet the City Charter requirements would have been clear at the time the Nation attempted to retain counsel.

An initial determination that unique, special circumstances make it appropriate to deny attorneys fees is warranted, although the Nation did not seek compensatory damages. The probability of a significant compensatory award is considered because it does not contravene the purpose of the fee- shifting statute. *Id.* at 344. Rather, the prospect of such an award, in a case with strong merits, makes retention of counsel easier for the civil rights plaintiff, so that an award of attorneys fees does not further the purpose of the fee-shifting statute. See *id.* The purpose of an attorneys fee award is to " 'encourage the bringing of meritorious civil rights claims

which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.' " *Id.* (quoting *Kerr*, 692 F.2d at 877). Here, counsel had been obtained for the land claim litigation and this follow- on tax claim litigation. Further, the Nation has significant financial resources. It can be confidently stated that this meritorious civil rights claim would not have "otherwise been abandoned" had there not been the prospect of recovery of a statutory attorneys fee award. *See id.* The strength of the merits of the claims and the significance of the status of the properties at issue, coupled with the known financial resources of the Nation, make an appropriate case for a finding of special circumstances.

Having determined that the first requirement for denial of fees is met, it must be determined whether an award of fees might work an injustice. Although there is no award of compensatory or punitive damages, the declaratory and injunctive relief obtained works a financial detriment on Sherrill and Madison County. Sherrill and Madison County have lost the property tax revenue from the properties from the time of the reacquisition, for as long as the Nation retains them. The harm to the Nation, given the relief obtained herein, is nonexistent, or at best, relatively little in degree and difficult to measure. The general public does, of course, have an interest in these claims. However, these are not the type of civil rights claims which the law was designed to encourage. Rather, these claims are more in the nature of disputes between sovereign parties.

Special circumstances make this an appropriate case to deny attorneys fees. *See id.* at 344. In light of all of the circumstances of the case such an award is not warranted and would work an injustice. Accordingly, an award of attorneys fees must be denied. *See id.* at 345.

V. *CONCLUSION*

The Sherrill and Madison County properties that are the subject of the instant lawsuits are Oneida Reservation lands and therefore are Indian Country pursuant to 25 U.S.C. § 1151. The 1838 Treaty of Buffalo Creek did not disestablish or diminish the Oneida Reservation. As Indian Country, the properties are not subject to taxation by Sherrill or the Counties. Moreover, Sherrill did not provide the Nation the process it was due in foreclosing on the properties. Sherrill's motion for summary judgment in the Lead Case must therefore be denied. Sherrill's motion to amend its answer must also be denied, as amendment to add the asserted affirmative defenses would be futile. The Nation's cross motion for summary judgment in the Lead Case on its taxation and its due process claims must be granted. Sherrill's counterclaims against the Nation in the Lead Case are barred by sovereign immunity. The Nation is entitled to judgment in its favor on the counterclaims.

The Nation is also protected by sovereign immunity from suit for eviction by Sherrill and therefore is entitled to judgment in its favor in the Eviction Case.

The motion to stay in the Member Case is moot. The actions of any individual Nation representatives in directing the Nation not to pay property taxes was not *ultra vires*, as the properties are Indian Country and not taxable. The lawsuit against the Nation representatives for collection of property taxes is contrary to the Sherrill Charter and New York State law. Moreover, the Nation would be an indispensable party and any such suit must be dismissed in its absence. The motion to dismiss brought by the Nation representatives in the Member Case must be granted.

The properties in question being Indian Country, the Nation is entitled to judgment on the pleadings in the Related Case against Madison County.

The Nation is not entitled to an award of attorneys fees.

Accordingly, it is

ORDERED that

1. The City of Sherrill's motion for summary judgment or in the alternative for a preliminary injunction in the Lead Case 00-CV-223 is DENIED;

2. The Oneida Indian Nation of New York's cross motion for summary judgment in the Lead Case 00-CV-223, on all claims and counterclaims, is GRANTED;

3. The counterclaims against the Oneida Indian Nation of New York brought by the City of Sherrill in the Lead Case 00-CV-223 are DISMISSED;

4. The City of Sherrill's motion to amend its answer to add affirmative defenses in the Lead Case 00-CV-223 is DENIED;

5. The Oneida Indian Nation of New York's motion for summary judgment in the Eviction Case 00-CV-327 is GRANTED, and the petition for eviction is DISMISSED;

6. Ray Halbritter, Keller George, Chuck Fougnier, Brian Patterson, Marilyn John, Clint Hill, Dale Rood, Dick Lynch, Ken Phillips, Iva Rodgers, Beulah Green, and Ruth Burr's motion to dismiss in the Member Case 00-CV-1106 is GRANTED, and the complaint is DISMISSED;

7. Judgment on the pleadings in favor of the Oneida Indian Nation of New York and against Madison County is GRANTED in the Related Case 00-CV-506;

8. The properties at issue, known by tax identification as City of Sherrill parcels 322.014-1-23, 322.014-1-24, 322.014-1-25, 322.014-1-26, 322.015-2-1, 322.015-2-64, 322.015-2-65, 322.015-2-40.3, 322.015-2-45.1, 322.015-2-47 and Madison County parcels 28.-2-13.11, 28.-2-13.2, 36.5-1-20, 36.38-1-34, 36.6-1- 4, 36.38-1-33, 36.38-1-32, 36.62-2-21, 91.-1-51, 36.6-1-1, 36.6-1-3, 36.-1-2, and 28.-2-13.12 are Indian reservation land immune from state and local property taxation while in the possession of the Oneida Indian Nation of New York; the Oneida Indian Nation of New York is immune from property taxation with respect to these properties, attempts by the City of Sherrill and Madison County to tax or foreclose on these properties while they are in the possession of the Oneida Indian Nation of New York are null and void; tax sales with respect to these properties are null and void; attempts by the City of Sherrill to foreclose and to convey them violated 42 U.S.C. § 1983 because of constitutionally-deficient notice; attempts by the City of Sherrill and Madison County to interfere with the ownership, possession, and occupancy of the Oneida Indian Nation of New York with respect to these properties or to evict the Oneida Indian Nation of New York from said properties are null and void;

9. The City of Sherrill and its officers, agents, servants, and employees and all persons and entities in active concert or participation with them are hereby ENJOINED and RESTRAINED from taking any act to impose property taxes upon, or to collect property taxes with respect to the properties known by tax identification numbers 322.014-1-23, 322.014-1-24, 322.014-1-25, 322.014-1-26, 322.015-2-1, 322.015-2-64, 322.015-2-65, 322.015-2-40.3, 322.015-2-45.1, 322.015-2-47 while they are in the possession of the

Oneida Indian Nation of New York; from interfering with the Oneida Indian Nation of New York's ownership, possession, or occupancy of these properties; and from taking any act to evict the Oneida Indian Nation of New York or its officers, agents, servants, employees, members, guests, customers or invitees from these properties; and are further ENJOINED to rescind and reverse all property transfers with respect to foreclosure or conveyance regarding these properties and to record these properties as owned by the Oneida Indian Nation of New York until such time as a conveyance of them is approved pursuant to 25 U.S.C. § 177; and

10. Madison County and its officers, agents, servants, and employees and all persons and entities in active concert or participation with them are hereby ENJOINED and RESTRAINED from taking any act to impose property taxes upon, or to collect property taxes with respect to the properties known by tax identification numbers 28.-2-13.11, 28.-2-13.2, 36.5-1-20, 36.38-1-34, 36.6-1- 4, 36.38-1-33, 36.38-1-32, 36.62-2-21, 91.-1-51, 36.6-1-1, 36.6-1-3, 36.-1-2, and 28.-2-13.12 while they are in the possession of the Oneida Indian Nation of New York; from interfering with the Oneida Indian Nation of New York's ownership, possession, or occupancy of these properties; and from taking any act to evict the Oneida Indian Nation of New York or its officers, agents, servants, employees, members, guests, customers or invitees from these properties; and are further ENJOINED to rescind and reverse all property transfers with respect to foreclosure or conveyance regarding these properties and to record these properties as owned by the Oneida Indian Nation of New York until such time as a conveyance of them is approved pursuant to 25 U.S.C. § 177.

11. Attorneys fees pursuant to 42 U.S.C. § 1988 are DENIED.

The Clerk of the Court is directed to enter separate judgments in each case in accordance with this Memorandum-Decision and Order.

IT IS SO ORDERED.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING OR REHEARING *EN BANC*
FILED SEPTEMBER 15, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15th Day of September, two thousand three.

Docket No. 01-7795

ONEIDA INDIAN NATION OF NEW YORK,
Plaintiff-Counter-Defendant-Appellee,

RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, RUTH BURR, BRIAN PATTERSON, IVA RODGERS,
Consolidated Defendants-Appellees,

v.

CITY OF SHERRILL, NEW YORK,
Defendant-Counter-Claimant-Appellant,

MADISON COUNTY,
Amicus Curiae-Appellant,

ONEIDA LTD., STATE OF NEW YORK,
Amicus Curiae-Amicus

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by Defendant-Counter-Claimant-Apellant, City of Sherrill, New York

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is **DENIED.**

It is further noted that the petitions for rehearing en banc have been transmitted to the judges for the Court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE

By: s/_____
Arthur Heller,
Motions Staff Attorney

1788 TREATY OF FORT SCHUYLER, SEPTEMBER 22, 1788

STATE TREATY WITH THE ONEIDA INDIANS, 1788.

At a treaty held at Fort Schuyler, formerly called Fort Stanwix in the State of New York, by his Excellency George Clinton, Governor of the said State, and William Floyd, Ezra L'Hommedieu, Richard Varick, Samuel Jones, Egbert Benson and Peter Gansevoort, Junr. (Commissioners authorized for that purpose by and on behalf of the People of the State of New York) with the Tribe or Nation of Indiana called the Oneidas - it is on the twenty-second day of September, in the year one thousand seven hundred and eighty-eight, covenanted and concluded as follows:

First, The Oneidas do cede and grant all their lands to the people of the State of New York forever.

Secondly, Of the paid ceded lands the following tract to wit: Beginning at the Wood Creek opposite to the mouth of the Canada Creek, and where the line of property comes to the Said Wood Creek, and runs thence southerly to the north-west corner of the tract to be granted to John Francis Perache, thence along the westerly pounds of the said tract to the south-west corner thereof, thence to the north-west corner of a tract granted to James Dean; thence along the westerly bounds thereof to the south-west corner 6 ' of last mentioned tract; thence due south until it intersects a due west line from the bead of the Tianaderha or Unadilla River; thence from the said point of intercession due west until the Deep Spring bears due North; thence due North to the Deep Spring, thence the nearest course to the Caneserage Creek, and thence along the said Creek the Oneida Lake and the Wood Creek' to the place of beginning, shall be reserved for the following several uses. That is to say, the lands lying to the northward on a line parallel to the southern line of the said reserved

lands, and four miles distant from the said Southern line, the Oneidas shall hold to themselves and their posterity forever for their own use and' cultivation, but not to be. sold, leased or in any other manner aliened or disposed of to others. The Oneidas may from time to time forever make leases of the lands between the said parallel line (being the residue of the said reserved lands) to such persons and on such rents reserved as they shall deem proper; but no lease shall for a longer term than twenty-one years from the making thereof; and no new lease shall be. made until the former lease of the same lands shall have expired. The rents shall be to the use of the Oneidas and their posterity forever; and the people of the State of New York shall from time to time make provision by law to compel the lessees to pay the rents, and in every other respect to enable the Oneidas and their posterity to have the full benefit of their rights so to make leases and to prevent frauds on them respecting the same; and the Oneidas and their posterity forever shall enjoy the free right of hunting in every part of the said ceded lands, and of fishing in all the waters within the same, and especially there shall forever remain ungranted by the people of the State of New York one half mile square at the distance of every six miles of the lauds along the northern banks of the Oneida Lake, one half mile in breadth of the lands on each aide of the Fish Creek, and a convenient piece of land at the fishing place in the Onondaga River about three miles from where it issues out of the Oneida Lake, and to remain as well for the Oneidas and their posterity as for the inhabitants of the said State to land and encamp on. But notwithstanding any reservation to the Oneidas, the people of the State of New York may erect public works and edifices as they shall think proper at such place and places at or near the confluence of the Wood Creek and the Oneida Lake as they shall elect and may take and appropriate for such works or buildings lauds to the extent of one square mile at each place; and further notwithstanding any reservations of lands to the Oneidas for their own use, the New England Indiana (now settled at Brothertown under

the pastoral care of the Rev. Samson Occom and their posterity forever, and the Stockbridge Indians and their posterity forever are to enjoy their settlements on the lands heretofore given to. them by the Oneidas for that purpose, that is to say, a tract of two miles in breadth and three miles in length for the New England Indiana, and a tract of six miles square for the Stockbridge Indiana.

Thirdly, In consideration of the Raid Cession and Grant, the People of the State of New York do at this treaty pay to the Oneidas two thousand dollars in money, two thousand dollars in clothing and other goods, and one thousand dollars in provisions; and also five hundred dollars in money to be applied towards building a grist milt and saw mill at their village (the receipt of which moneys, clothing and goods and provisions the Oneidas do now acknowledge), and the People of the State of New York shall annually pay to the Oneidas and their posterity forever on the first day of June in every year at Fort Schuyler aforesaid six hundred dollars in silver; but it the Oneidas or their posterity shall at any time hereafter elect that the whole or any part of the said six hundred dollar's shall be paid in clothing or provisions, and give six weeks previous notice thereof to the Governor of the said State for the time being, then so much of the annual payment shall for that time be in clothing or provisions as the Oneidas and their posterity shall elect, and at the price which the same shall cost the people of the State of New York at Fort Schuyler aforesaid and as a further consideration to the Oneidas the people Of the State of New York shall grant to the Raid John Francis Perache a tract of land, Beginning in the line of property at it certain cedar tree near the road leading to Oneida and runs from the Raid cedar tree southerly along the line of property two miles; thence westerly at right angles to the said line of property two miles; thence northerly at right angles to the last course two miles, and thence to the place of beginning; which the said John Francis Perache bath consented to accept from the Oneidas in satisfaction for an

injury done to him by one of their Nation. And further, the lands intended by the Oneidas for John T. Kirkland and for George IV. Kirkland, being now appropriated to the use of the Oneidas, the people of the State of New York shall therefore, by a grant of other lands make compensation to tile said John T. Kirkland and George W. Kirkland. And further, that the people of the State of New York shall as a benevolence from tile Oneidas to Peter Penet and in return for services rendered by him to their Nation, grant to the said Peter Penet of the Raid ceded lands lying to the northward of the Oneida Lake a tract of ten miles square, wherever he shall elect the same.

Fourthly. The people of the State of New York may in such manner as they shall deem proper, prevent any persons except the Oneidas, front residing or settling on the lands so to be held by the Oneidas and their posterity for their use and cultivation. and if any person shall without the consent of the People of the State of New York come to reside or settle on the said lands or any other of the lands so ceded as aforesaid, except the lands whereof the Oneidas may make leases as aforesaid, the Oneidas and their posterity shall forthwith give notice of such intrusions to the Governor of the said state, for the time being And further, the Oneidas and their posterity forever shall at the request of the Governor of the Raid State be aiding to the people of the State of New York in removing all such intruders and in apprehending not only such intruders but also felons, and other offenders who may happen to be on the said ceded lands, to the end I hat such intruders, felons and other offenders may be brought to justice.

In testimony thereof as well the sachems chiefs, warriors and others of the said Oneidas in behalf of their tribe or Nation its the said Governor and other commissioners of the People of the State of New York, have hereunto interchangeably set their hands and affixed their seals the day and year first above written.

ODAGHSEGHTE
KANAGHGWEYA

1794 TREATY OF CANANDAIGUA, NOVEMBER 11, 1794

Preamble of the Canandaigua Treaty

A Treaty Between the United States of America and the Tribes of Indians Called the Six Nations:

The President of the United States having determined to hold a conference with the Six Nations of Indians for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the sachems and warriors of the Six Nations in general council: Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles, which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations....

ARTICLE 1. Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

ARTICLE 2. The United States acknowledge the lands reserved to the Oneida, Onondaga, and Cayuga Nations in their respective treaties with the State of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them, or either of the Six Nations, nor their Indian friends, residing thereon, and united with them in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE 3. The land of the Seneca Nation is bounded as follows: beginning on Lake Ontario, at the northwest corner of the land they sold to Oliver Phelps; the line runs westerly along the lake, as far as Oyongwongyeh Creek, at Johnson's Landing Place, about four miles eastward, from the fort of Niagara; then southerly, up that creek to its main fork, continuing the same straight course, to that river; (this line, from the mouth of Oyongwongyeh Creek, to the river Niagara, above Fort Schlosser, being the eastern boundry of a strip of land, extending from the same line to Niagara River, which the Seneca Nation ceded to the King of Great Britain, at the treaty held about thirty years ago, with Sir William Johnson;) then the line runs along the Niagara River to Lake Erie, to the northwest corner of a triangular piece of land, which the United States conveyed to the State of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that State; then due east to the southwest corner of the land sold by the Seneca Nation to Oliver Phelps; and then north and northerly, along Phelps' line, to the place of beginning, on the Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneca Nation; and the United States will never claim the same, nor disturb the Seneca Nation, nor any of the Six Nations, or of their Indian friends residing thereon, and united with them, in the free use and enjoyment thereof; but it shall remain theirs, until they choose to sell the same, to the people of the United States, who have the right to purchase.

ARTICLE 4. The United States have thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senecas, and engaged never to claim the same, not disturb them, or any of the Six Nations, or their Indian friends residing thereon, and united with them, in the free use and enjoyment thereof; now, the Six Nations, and each of them, hereby engage that they will never claim any other

lands, within the boundaries of the United States, nor ever disturb the people of the United States in the free use and enjoyment thereof.

ARTICLE 5. The Seneca Nation, all others of the Six Nations concurring cede to the United States the right of making a wagon road from Fort Schlosser to Lake Erie, as far south as Buffalo Creek; and the people of the United States shall have the free and undisturbed use of this road for the purposes of traveling and transportation. And the Six Nations and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbors and rivers adjoining and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes, where necessary, for their safety.

ARTICLE 6. In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations; and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established strong and perpetual, the United States now deliver to the Six Nations, and the Indians of the other nations residing among them, a quantity of goods, of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars heretofore allowed to them by an article ratified by the President, on the twenty-third day of April, 1792, making in the whole four thousand five hundred dollars; which shall be expended yearly, forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils, suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their

benefit. The immediate application of the whole annual allowance now stipulated, to be made by the superintendent, appointed by the President, for the affairs of the Six Nations, and their Indian friends aforesaid.

ARTICLE 7. Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and the Six Nations agree, that for injuries done by individuals, on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other; by the Six Nations or any of them, to the President of the United States, or the superintendent by him appointed; and by the superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the Nation to which the offender belongs; and such prudent measures shall then be pursued, as shall be necessary to preserve or peace and friendship unbroken, until the Legislature (or Great Council) of the United States shall make other equitable provision for that purpose.

NOTE: It is clearly understood by the parties to this treaty, that the annuity, stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations, and of their Indian friends united with them, as aforesaid, as do or shall reside within the boundaries of the United States; for the United States do not interfere with nations, tribes or families of Indians, elsewhere resident.

IN WITNESS WHEREOF, the said Timothy Pickering, and the sachems and war chiefs of the said Six Nations, have hereunto set their hands and seals.

Done at Canandaigua, in the State of New York, in the eleventh day of November, in the year one thousand seven hundred and ninety-four.

TIMOTHY PICKERING

Witnesses
Interpreters
Israel Chapin Horatio Jones
Wm. Shepard Jun'r Joseph Smith
James Smedley Jasper Parrish
John Wickham Henry Abeele
Augustus Porter
James H. Garnsey
Wm. Ewing
Israel Chapin, Jun'r

(Signed by fifty-nine Sachems and War Chiefs of the Six Nations.)

CANANDAIGUA, NEW YORK - NOVEMBER 11, 1797

Native American Name English Translation
O-NO-YE-AH-NEE O-NA-AH-HAH TUG-GEH-SHOT-TA KON-NE-AT-OR-TEE-OOH HOT-OSH-A-HENH TEH-ONG-YOO-WUSH Handsome Lake
KAU-KON-DA-NAI-YA TEH-ONG-YA-GAU-NA TO-KENH-YOU-HAU Capt. Key
NON-DI-YAU-KA KON-NE-YOO-WE-SOT O-NES-HAU-EE KOS-SISH-TO-WAU TI-OOH-QUOT-TA-KAU-NA Woods On Fire
HENDRICK AUPAUMUT TO-HE-ONG-GO TA-OUN-DAU-DEESH DAVID NEESOONHUK OO-JAU-GEHT-A Fish Carrier
HO-NA-YA-WUS KANATSOYH Farmer's Brother or Nicholas Kusick
OOT-A-GUAS-SO SOG-GOO-YA-WAUT-HAU SOH-HON-TE-O-QUENT JOO-NON-DAU-WA-ONCH Red Jacket

OO-DUHT-SA-IT KAU-NEH-SHONG-GOO KON-YOO-TAI-YOO KO-NOOH-QUNG KI-YAU-HA-ONH SAUH-TA-KA-ONG-YEES Two Skies Of A Length
TOS-SONG-GAU-LO-LUSS OO-TAU-JE-AU-GENH Broken Axe
OUN-NA-SHATTA-KAU JOHN SHEN-EN-DO-A TAU-HO-ON-DOS KA-UNG-YA-NEH-QUEE O-NE-AT-OR-LEE-OOH Open The Way or Handsome Lake
SOO-A-YOO-WAU TWAU-KE-WASH-A KUS-SAU-WA-TAU KAU-JE-A-GA-ONH SE-QUID-ONG-QUEE Heap Of Dogs
E-YOO-TEN-YOO-TAU-OOK KO-DJEOTE SOO-NOOH-SHOO-WAU KOHN-YE-AU-GONG Half Town or Jake Stroud
THA-OG-WAU-NI-AS KEN-JAU-AU-GUS SHA-QUI-EA-SA Stinking Fish
SOO-NONG-JOO-WAU TEER-OOS SOO-NOH-QUA-KAU KI-ANT-WHAU-KA Capt. Prantup or Cornplanter
TWEN-NI-YA-NA HENRY YOUNG BRANT JISH-KAA-GA SOOS-YOO-WAU-NA Green Grasshopper or Big Sky or Little Billy

1838 TREATY OF BUFFALO CREEK, JANUARY 15, 1838

Articles of a treaty made and concluded at Buffalo Creek in the State of New York, the fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, by Ransom H. Gillet, a commissioner on the part of the United States, and the chiefs, head men and warriors of the several tribes of New York Indians assembled in council witnesseth:

WHEREAS, the six nations of New York Indians not long after the close of the war of the Revolution, became convinced from the rapid increase of the white settlements around, that the time was not far distant when their true interest must lead them to seek a new home among their red brethren in the West: And whereas this subject was agitated in a general council of the Six nations as early as 1810, and resulted in sending a memorial to the President of the United States, inquiring whether the Government would consent to their leaving their habitations and their removing into the neighborhood of their western brethren, and if they could procure a home there, by gift or purchase, whether the Government would acknowledge their title to the lands so obtained in the same manner it had acknowledged it in those from whom they might receive it; and further, whether the existing treaties would, in such a case remain in full force, and their annuities be paid as heretofore: And whereas, with the approbation of the President of the United States, purchases were made by the New York Indians from the Menomonie and Winnebago Indians of certain lands at Green Bay in the Territory of Wisconsin, which after much difficulty and contention with those Indians concerning the extent of that purchase, the whole subject was finally settled by a treaty between the United States and the Menomonie Indians, concluded in February, 1831, to which the New York Indians gave their assent on the seventeenth day of

October 1832: And whereas, by the provisions of that treaty, five hundred thousand acres of land are secured to the New York Indians of the Six Nations and the St. Regis tribe, as a future home, on condition that they all remove to the same, within three years, or such reasonable time as the President should prescribe: And whereas, the President is satisfied that various considerations have prevented those still residing in New York from removing to Green Bay, and among other reasons, that many who were in favour of emigration, preferred to remove at once to the Indian territory, which they were fully persuaded was the only permanent and peaceful home for all the Indians. And they therefore applied to the President to take their Green Bay lands, and provide them a new home among their brethren in the Indian territory. And whereas, the President being anxious to promote the peace, prosperity and happiness of his red children, and being determined to carry out the humane policy of the Government in removing the Indians from the east to the west of the Mississippi, within the Indian territory, by bringing them to see and feel, by his justice and liberality, that it is their true policy and for their interest to do so without delay.

Therefore, taking into consideration the foregoing premises, the following articles of a treaty are entered into between the United States of America and the several tribes of the New York Indians, the names of whose chiefs, head men and warriors are hereto subscribed, and those who may hereafter give their assent to this treaty in writing, within such time as the President shall appoint.

GENERAL PROVISIONS.

ARTICLE 1.

The several tribes of New York Indians, the names of whose chiefs, head men, warriors and representatives are hereunto annexed, in consideration of the premises above recited, and

the covenants hereinafter contained, to be performed on the part of the United States, hereby cede and relinquish to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menomonie treaty of 1831, excepting the following tract, on which a part of the New York Indians now reside: beginning at the southwesterly corner of the French grants at Green Bay, and running thence southwardly to a point on a line to be run from the Little Cocaclin, parallel to a line of the French grants and six miles from Fox River; from thence on said parallel line, northwardly six miles; from thence eastwardly to a point on the northeast line of the Indian lands, and being at right angles to the same.

ARTICLE 2.

In consideration of the above cession and relinquishment, on the part of the tribes of the New York Indians, and in order to manifest the deep interest of the United States in the future peace and prosperity of the New York Indians, the United States agree to set apart the following tract of country, situated directly west of the State of Missouri, as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes, which said country is described as follows, to wit: Beginning on the west line of the State of Missouri, at the northeast corner of the Cherokee tract, and running thence north along the west line of the State of Missouri twenty-seven miles to the southerly line of the Miami lands; thence west so far as shall be necessary, by running a line at right angles, and parallel to the west line aforesaid, to the Osage lands, and thence easterly along the Osage and Cherokee lands to the place of beginning to include one million eight hundred and twenty-four thousand acres of land, being three hundred and twenty acres for each soul of said Indians as their numbers are at present computed. To have and to hold the same in fee simple to the said tribes

or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act, entitled "An act to provide for an exchange of lands, with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi," approved on the 28th day of May, 1830, with full power and authority in the said Indians to divide said lands among the different tribes, nations, or bands, in severalty, with the right to sell and convey to and from each other, under such laws and regulations as may be adopted by the respective tribes, acting by themselves, or by a general council of the said New York Indians, acting for all the tribes collectively. It is understood and agreed that the above described country is intended as a future home for the following tribes, to wit: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns residing in the State of New York, and the same is to be divided equally among them, according to their respective numbers, as mentioned in a schedule hereunto annexed.

ARTICLE 3.

It is further agreed that such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may, from time to time, appoint, shall forfeit all interest in the lands so set apart, to the United States.

ARTICLE 4.

Perpetual peace and friendship shall exist between the United States and the New York Indians; and the United States hereby guaranty to protect and defend them in the peaceable possession and enjoyment of their new homes, and hereby secure to them, in said country, the right to establish their

own form of government, appoint their own officers, and administer their own laws; subject, however, to the legislation of the Congress of the United States, regulating trade and intercourse with the Indians. The lands secured to them by patent under this treaty shall never be included in any State or Territory of this Union. The said Indians shall also be entitled, in all respects, to the same political and civil rights and privileges, that are granted and secured by the United States to any of the several tribes of emigrant Indians settled in the Indian Territory.

ARTICLE 5.

The Oneidas are to have their lands in the Indian Territory, in the tract set apart for the New York Indians, adjoining the Osage tract, and that hereinafter set apart for the Senecas; and the same shall be so laid off as to secure them a sufficient quantity of timber for their use. Those tribes, whose lands are not specially designated in this treaty, are to have such as shall be set apart by the President.

ARTICLE 6.

It is further agreed that the United States will pay to those who remove west, at their new homes, all such annuities, as shall properly belong to them. The schedules hereunto annexed shall be deemed and taken as a part of this treaty.

ARTICLE 7.

It is expressly understood and agreed, that this treaty must be approved by the President and ratified and confirmed by the Senate of the United States, before it shall be binding upon the parties to it. It is further expressly understood and agreed that the rejection, by the President and Senate, of the provisions thereof, applicable to one tribe, or distinct branch of a tribe, shall not be construed to invalidate as to others, but

as to them it shall be binding, and remain in full force and effect.

ARTICLE 8.

It is stipulated and agreed that the accounts of the Commissioner, and expenses incurred by him in holding a council with the New York Indians, and concluding treaties at Green Bay and Duck Creek, in Wisconsin, and in the State of New York, in 1836, and those for the exploring party of the New York Indians, in 1837, and also the expenses of the present treaty, shall be allowed and settled according to former precedents.

SPECIAL PROVISIONS FOR THE ST. REGIS.

ARTICLE 9.

It is agreed with the American party of the St. Regis Indians, that the United States will pay to the said tribe, on their removal west, or at such time as the President shall appoint, the sum of five thousand dollars, as a remuneration for monies laid out by the said tribe, and for services rendered by their chiefs and agents in securing the title to the Green Bay lands, and in removal to the same, the same to be aportioned out to the several claimants by the chiefs of the said party and a United States' Commissioner, as may be deemed by them equitable and just. It is further agreed, that the following reservation of land shall be made to the Rev. Eleazor Williams, of said tribe, which he claims in his own right, and in that of his wife, which he is to hold in fee simple, by patent from the President, with full power and authority to sell and dispose of the same, to wit: beginning at a point in the west bank of Fox River thirteen chains above the old milldam at the rapids of the Little Kockalin; thence north fifty-two degrees and thirty minutes west, two hundred and forty chains; thence north thirty-seven degrees and thirty

minutes east, two hundred chains, thence south fifty-two degrees and thirty minutes east, two hundred and forty chains to the bank of Fox river; thence up along the bank of Fox river to the place of beginning.

SPECIAL PROVISIONS FOR THE SENECAS.

ARTICLE 10.

It is agreed with the Senecas that they shall have for themselves and their friends, the Cayugas and Onondagas, residing among them, the easterly part of the tract set apart for the New York Indians, and to extend so far west, as to include one half-section (three hundred and twenty acres) of land for each soul of the Senecas, Cayugas and Onandagas, residing among them; and if, on removing west, they find there is not sufficient timber on this tract for their use, then the President shall add thereto timber land sufficient for their accommodation, and they agree to remove; to remove from the State of New York to their new homes within five years, and to continue to reside there. And whereas at the making of this treaty, Thomas L. Ogden and Joseph Fellows the assignees of the State of Massachusetts, have purchased of the Seneca nation of Indians, in the presence and with the approbation of the United States Commissioner, appointed by the United States to hold said treaty, or convention, all the right, title, interest, and claim of the said Seneca nation, to certain lands, by a deed of conveyance a duplicate of which is hereunto annexed; and whereas the consideration money mentioned in said deed, amounting to two hundred and two thousand dollars, belongs to the Seneca nation, and the said nation agrees that the said sum of money shall be paid to the United States, and the United States agree to receive the same, to be disposed of as follows: the sum of one hundred thousand dollars is to be invested by the President of the United States in safe stocks, for their use, the income of which is to be paid to them at their new homes, annually, and

the balance, being the sum of one hundred and two thousand dollars, is to be paid to the owners of the improvements on the lands so deeded, according to an appraisement of said improvements and a distribution and award of said sum of money among the owners of said improvements, to be made by appraisers, hereafter to be appointed by the Seneca nation, in the presence of a United States Commissioner, hereafter to be appointed, to be paid by the United States to the individuals who are entitled to the same, according to said apprisal and award, on their severally relinquishing their respective possessions to the said Ogden and Fellows.

SPECIAL PROVISIONS FOR THE CAYUGAS.

ARTICLE 11.

The United States will set apart for the Cayugas, on their removing to their new homes at the west, two thousand dollars, and will invest the same in some safe stocks, the income of which shall be paid them annually, at their new homes. The United States further agree to pay to the said nation, on their removal west, two thousand five hundred dollars, to be disposed as the chiefs shall deem just and equitable.

SPECIAL PROVISIONS FOR THE ONONDAGAS RESIDING ON THE SENECA RESERVATIONS.

ARTICLE 12.

The United States agree to set apart for the Onondagas, residing on the Seneca reservations, two thousand five hundred dollars, on their removing west, and to invest the same in safe stocks, the income of which shall be paid to them annually at their new homes. And the United States further agree to pay to the said Onondagas, on their removal

to their new homes in the west, two thousand dollars, to be disposed of as the chiefs shall deem equitable and just.

SPECIAL PROVISIONS FOR THE ONEIDAS RESIDING IN THE STATE OF NEW YORK.

ARTICLE 13.

The United States will pay the sum of four thousand dollars, to be paid to Baptista Powlis, and the chiefs of the first Christian party residing at Oneida, and the sum of two thousand dollars shall be paid to William Day, and the chiefs of the Orchard party residing there, for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof; and they hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida.

SPECIAL PROVISIONS FOR THE TUSCARORAS.

ARTICLE 14.

The Tuscarora nation agree to accept the country set apart for them in the Indian territory, and to remove there within five years, and continue to reside there. It is further agreed that the Tuscaroras shall have their lands in the Indian country, at the forks of the Neasha river, which shall be so laid off as to secure a sufficient quantity of timber for the accommodation of the nation. But if on examination they are not satisfied with this location, they are to have their lands at such place as the President of the United States shall designate. The United States will pay to the Tuscarora nation, on their settling at the West, three thousand dollars, to be disposed of as the chiefs shall deem most equitable and just. Whereas the said nation owns, in fee simple, five thousand acres of land, lying in

Niagara county, in the State of New York which was conveyed to the said nation by Henry Dearborn and they wish to sell and convey the same before they remove West: Now therefore, in order to have the same done in a legal and proper way, they hereby convey the same to the United States and to be held in trust for them, and they authorize the President to sell and convey the same, and the money which shall be received for the said lands, exclusive of the improvements, the President shall invest in safe stocks for their benefit, the income from which shall be paid to the nation, at their new homes, annually; and the money which shall be received for improvements on said lands shall be paid to the owners of the improvements when the lands are sold. The President shall cause the said lands to be surveyed, and the improvements shall be appraised by such persons as the nation shall appoint; and said lands shall also be appraised, and shall not be sold at a less price than the appraisal, without the consent of James Cusick, William Mountpleasant and William Chew, or the survivor, or survivor of them; and the expenses incurred by the United States in relation to this trust are to be deducted from the moneys received before investment.

And whereas, at the making of this treaty, Thomas L. Ogden and Joseph Fellows, the assignees of the State of Massachusetts, have purchased of the Tuscarora nation of Indians, in the presence and with the approbation of the commissioner appointed on the part of the United States to hold said treaty or convention, all the right, title, interest, and claim of the Tuscarora nation to certain lands, by a deed of conveyance, a duplicate of which is hereunto annexed: And whereas, the consideration money for said lands has been secured to the said nation to their satisfaction, by Thomas L. Ogden and Joseph Fellows; therefore the United States hereby assent to the said sale and conveyance and sanction the same.

ARTICLE 15.

The United States hereby agree that they will appropriate the sum of four hundred thousand dollars, to be applied from time to time, under the direction of the President of the United States, in such proportions, as may be most for the interest of the said Indians, parties to this treaty, for the following purposes, to wit: To aid them in removing to their homes, and supporting themselves the first year after their removal; to encourage and assist them in education, and in being taught to cultivate their lands; in erecting mills and other necessary houses; in purchasing domestic animals, and farming utensils and acquiring a knowledge of the mechanic arts.

In testimony whereof, the commissioner and the chiefs, head men, and people, whose names are hereto annexed, being duly authorized, have hereunto set their hands, and affixed their respective seals, at the time and place above mentioned.

R. H. Gillet, Commissioner.

Senecas:
Dao-nepho-gah, or Little Johnson,
Da-ga-o-geas, or Daniel Twoguns,
Gee-odow-neh, or Captain Pollard,
Joh-nes-ha-dih, or James Stevenson,
Hure-hau-stock, or Captain Strong,
So-ne-a-ge, or Captain Snow,
Hau-neh-hoy's-oh, or Blue Eyes,
Haw-naw-wah-es, or Levi Halftown,
Goat-hau-oh, or Billy Shanks,
Hau-sa-nea-nes, or White Seneca,
Howah-do-goh-deh, or George Bennet,
Hays-tah-jih, or Job Pierce,
Sho-nan-do-wah, or John Gordon,
Noh-sok-dah, or Jim Jonas,
Shaw-neh-dik, or William Johnson,

Gaw-neh-do-au-ok, or Reuben Pierce,
Shaw-go-nes-goh-sha-oh, or Morris Halftown,
Shaw-go-za-sot-hoh, or Jacob Jameson,
Gua-wa-no-oh, or George Big Deer,
Joh-que-ya-suse, or Samuel Gordon,
Gua-ne-oh-doh, or Thompson S. Harris,
Gau-geh-queh-doh, or George Jimeson,
Hon-non-de-uh, or Nathaniel T. Strong,
Nuh-joh-gau-eh, or Tall Peter,
Sho-nauk-ga-nes, or Tommy Jimmy,
So-joh-gwa-us, or John Tall Chief,
Shau-gau-nes-es-tip, or George Fox,
Go-na-daw-goyh, or Jabez Stevenson,
Tit-ho-yuh, or William Jones,
Juneah-dah-glence, or George White, by his agent White Seneca,
Gau-nu-su-goh, or Walter Thompson, by his agent Daniel Twoguns,
Dau-ga-se, or Long John,
Gua-sa-we-dah, or John Bark,
Gau-ni-dough, or George Lindsay,
Ho-ma-ga-was, or Jacob Bennet,
On-di-heh-oh, or John Bennet,
Nis-ha-nea-nent, or Seneca White,
Ha-dya-no-doh, or Maris Pierce,
Yoh-dih-doh, or David White,
James Shongo,
Ka-non-da-gyh, or William Cass,
Ni-ge-jos-a, or Samuel Wilson,
Jo-on-da-goh, or John Seneca.
Tuscaroras:
Ka-nat-soyh, or Nicholas Cusick,
Sacharissa, or William Chew,
Kaw-we-ah-ka, or William Mt. Pleasant,
Kaw-re-a-rock-ka, or John Fox,
Gee-me, or James Cusick,
Ju-hu-ru-at-kak, or John Patterson,

O-tah-guaw-naw-wa, or Samuel Jacobs,
Ka-noh-sa-ta, or James Anthony,
Gou-ro-quan, or Peter Elm,
Tu-nak-she-a-han, or Daniel Peter.
Oneidas residing in the State of New-York, for themselves and their parties:
Baptiste Powlis,
Jonathan Jordan.
Oneidas at Green Bay:
John Anthony,
Honjoit Smith,
Henry Jordan,
Thomas King.
St. Regis:
Eleazer Williams, chief and agent.
Oneidas residing on the Seneca Reservation:
Hon-no-ne-ga-doh, or Silversmith, (For himself and in behalf of his nation.)
Hoge-wayhtah, or William Jacket,
Sah-hu-gae-ne, or Button George.
Principal Onondaga Warriors, in behalf of themselves and the Onondaga Warriors:
Ka-noh-qua-sa, or William John,
Dah-gu-o-a-dah, or Noah Silversmith.
Cayugas:
Skok-no-eh, or King William,
Geh-da-or-loh, or James Young,
Gay-on-wek, or Jack Wheelbarrow,
D'yo-ya-tek, or Joseph Isaac, For themselves and in behalf of the nation.
Principal Cayuga Warriors, in behalf of themselves and the Cayuga Warriors:
Hah-oh-u, or John Crow,
Ho-na-e-geh-dah, or Snow Darkness,
Gone-ah-ga-u-do, or Jacob G. Seneca,
Di-i-en-use, or Ghastly Darkness,
Hon-ho-gah-dyok, or Thomas Crow,

Wau-wah-wa-na-onk, or Peter Wilson,
So-en-dagh, or Jonathan White,
Sago-gan-e-on-gwus, or Harvey Rowe,
To-ga-ne-ah-doh, or David Crow,
Soh-win-dah-neh, or George Wheeler,
Do-goh-no-do-nis, or Simon Isaac,
He-dai-ses, or Joseph Peter,
Sa-go-di-get-ka, or Jacob Jackson.

Witnesses:
James Stryker, Sub-agent, Six Nations, New York Indians.
Nathaniel T. Strong, United States' Interpreter, New York agency.
H. B. Potter.
Orlando Allen.
H. P. Wilcox.
Charles H. Allen.
Horatio Jones.
Spencer H. Cone.
W. W. Jones.
J. F. Schermerhorn.
Josiah Trowbridge.
(To the Indian names are subjoined a mark and seal.)

SCHEDULE A.
CENSUS OF THE NEW YORK INDIANS AS TAKEN IN 1837.
Number residing on the Seneca reservations.

Senecas 2,309
Onondagas 194
Cayugas 130
2,633
Onondagas, at Onondaga 300
Tuscaroras 273
St. Regis, in New York 350

Oneidas, at Green Bay 600
Oneidas, in New York 620
Stockbridges 217
Munsees 132
Brothertowns 360

The above was made before the execution of the treaty.
R. H. Gillet, Commissioner.

SCHEDULE B.

The following is the disposition agreed to be made of the sum of three thousand dollars provided in this treaty for the Tuscaroras, by the chiefs, and assented to by the commissioner, and is to form a part of the treaty:
To Jonathan Printess, ninety-three dollars.
To William Chew, one hundred and fifteen dollars.
To John Patterson, forty-six dollars.
To William Mountpleasant, one hundred and seventy-one dollars.
To James Cusick, one hundred and twenty-five dollars.
To David Peter, fifty dollars.
The rest and residue thereof is to be paid to the nation.

The above was agreed to before the execution of the treaty.
R. H. Gillet, Commissioner.

SCHEDULE C.

Schedule applicable to the Onondagas and Cayugas residing on the Seneca reservations. It is agreed that the following disposition shall be made of the amount set apart to be divided by the chiefs of those nations, in the preceding parts of this treaty, any thing therein to the contrary notwithstanding.

To William King, one thousand five hundred dollars.
Joseph Isaacs, seven hundred dollars.
Jack Wheelbarrow, three hundred dollars.
Silversmith, one thousand dollars.
William Jacket, five hundred dollars.
Buton George, five hundred dollars.

The above was agreed to before the treaty was finally executed.
R. H. Gillet, Commissioner.

Jan. 15, 1838.

At a treaty held under the authority of the United States of America, at Buffalo Creek in the county of Erie, and State of New York, between the chiefs and head men of the Seneca nation of Indians, duly assembled in council, and representing and acting for the said nation, on the one part, and Thomas Ludlow Ogden of the city of New York and Joseph Fellows of Geneva, in the county of Ontario, on the other part, concerning the purchase of the right and claim of the said Indians in and to the lands within the State of New York remaining in their occupation: Ransom H. Gillet, Esquire, a commissioner appointed by the President of the United States to attend and hold the said treaty, and also Josiah Trowbridge, Esquire, the superintendent on behalf of the Commonwealth of Massachusetts, being severally present at the said treaty, the said chiefs and head men, on behalf of the Seneca nation did agree to sell and release to the said Thomas Ludlow Ogden and Joseph Fellows, and they the said Thomas Ludlow Ogden and Joseph Fellows did agree to purchase all the right, title and claim of the said Seneca nation of, in and to the several tracts, pieces, or parcels of land mentioned, and described in the instrument of writing next hereinafter set forth, and at the price or sum therein specified, as the consideration, or purchase money for such

sale and release; which instrument being read and explained to the said parties and mutually agreed to, was signed and sealed by the said contracting parties, and is in the words following:

This indenture, made this fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, between the chiefs and head men of the Seneca nation of Indians, duly assembled in council, and acting for and on behalf of the said Seneca nation, of the first part, and Thomas Ludlow Ogden, of the city of New York, and Joseph Fellows of Geneva, in the county of Ontario, of the second part witnesseth: That the said chiefs and head men of the Seneca nation of Indians, in consideration of the sum of two hundred and two thousand dollars to them in hand paid by the said Thomas Ludlow Ogden and Joseph Fellows, the receipt whereof is hereby acknowledged, have granted, bargained, sold, released and confirmed, and by these presents do grant, bargain, sell, release and confirm unto the said Thomas Ludlow Ogden and Joseph Fellows, and to their heirs and assigns, all that certain tract, or parcel of land situate, lying and being in the county of Erie and State of New York commonly called and known by the name of Buffalo Creek reservation, containing, by estimation forty-nine thousand nine hundred and twenty acres be the contents thereof more or less. Also, all that certain other tract, or parcel of land, situate, lying and being in the counties of Erie, Chatauque, and Cattaraugus in said State commonly called and known by the name of Cattaraugus reservation, containing by estimation twenty-one thousand six hundred and eighty acres, be the contents thereof more or less. Also, all that certain other tract, or parcel of land, situate, lying and being in the said county of Cattaraugus, in said State, commonly called and known by the name of the Allegany reservation, containing by estimation thirty thousand four hundred and sixty-nine acres, be the contents more or less. And also, all that certain other tract or parcel of land, situate, lying and

being partly in said county of Erie and partly in the county of Genesee, in said State, commonly called and known by the name of the Tonawando reservation, and containing by estimation twelve thousand, eight hundred acres, be the same more or less; as the said several tracts of land have been heretofore reserved and are held and occupied by the said Seneca nation of Indians, or by individuals thereof, together with all and singular the rights, privileges, hereditaments and appurtenances to each and every of the said tracts or parcels of land belonging or appertaining; and all the estate, right, title, interest, claim, and demand of the said party of the first part, and of the said Seneca nation of Indians, of, in, and to the same, and to each and every part and parcel thereof: to have and to hold all and singular the above described and released premises unto the said Thomas Ludlow Ogden and Joseph Fellows, their heirs and assigns, to their proper use and behoof for ever, as joint tenants, and not as tenants in common.

In witness whereof, the parties to these presents have hereunto and to three other instruments of the same tenor and date one to remain with the United States, one to remain with the State of Massachusetts, one to remain with the Seneca nation of Indians, and one to remain with the said Thomas Ludlow Ogden and Joseph Fellows, interchangeably set their hands and seals the day and year first above written.

Little Johnson,
Daniel Two Guns,
Captain Pollard,
James Stevenson,
Captain Strong,
Captain Snow,
Blue Eyes,
Levi Halftown,
Billy Shanks,
White Seneca,
George Bennet,

John Pierce,
John Gordon,
Jim Jonas,
William Johnson,
Reuben Pierce,
Morris Halftown,
Jacob Jimeson,
Samuel Gordon,
Thompson S. Harris,
George Jemison,
Nathaniel T. Strong,
Tall Peter,
Tommy Jimmy,
John Tall Chief,
George Fox,
Jabez Stevenson,
William Jones.

I have attended a treaty of the Seneca Nation of Indians, held at Buffalo Creek, in the county of Erie, in the State of New York, on the fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, when the within instrument was duly executed, in my presence, by the chiefs of the Seneca Nation, being fairly and properly understood by them. I do, therefore, certify and approve the same.

R. H. Gillet, Commissioner.

Jan. 15, 1838.

At a treaty held under and by the authority of the United States of America, at Buffalo Creek, in the county of Erie, and State of New York, between the sachems, chiefs and warriors of the Tuscarora nation of Indians, duly assembled in council and representing and acting for the said nation, on the one part and Thomas Ludlow Ogden of the city of New

York and Joseph Fellows of Geneva in the county of Ontario, on the other part, concerning the purchase of the right and claim of the said nation of Indians in and to the lands within the State of New York, remaining in their occupation:
Ransom H. Gillet, Esquire, a commissioner appointed by the President of the United States to attend and hold the said treaty, and also Josiah Trowbridge, Esquire, the superintendent on behalf of the Commonwealth of Massachusetts, being severally present at the said treaty, the said sachems, chiefs and warriors, on behalf of the said Tuscarora nation, did agree to sell and release to the said Thomas Ludlow Ogden and Joseph Fellows, and they, the said Thomas Ludlow Ogden and Joseph Fellows did agree to purchase all the right, title and claim of the said Tuscarora nation of, in ~~and to the~~ tract, piece, or parcel of land mentioned and described in the instrument of writing next hereinafter set forth, and at the price, or sum therein specified, as the consideration or purchase money for such sale and release; which instrument being read and explained to the said parties, and mutually agreed to, was signed and sealed by the said contracting parties, and is in the words following:
This indenture, made this fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, between the sachems, chiefs, and warriors of the Tuscarora nation of Indians, duly assembled in council, and acting for and on behalf of the said Tuscarora nation of the first part, and Thomas Ludlow Ogden of the city of New York, and Joseph Fellows of Geneva, in the county of Ontario, of the second part witnesseth: That the said sachems, chiefs and warriors of the Tuscarora nation, in consideration of the sum of nine thousand six hundred dollars, to them in hand paid by the said Thomas Ludlow Ogden and Joseph Fellows, the receipt whereof is hereby acknowledged, have granted, bargained, sold released, and confirmed, and by these presents do grant, bargain, sell, release and confirm to the said Thomas Ludlow Ogden and Joseph Fellows, and to their

heirs and assigns, all that tract or parcel of land situate, lying and being in the county of Niagara and State of New York, commonly called and known by the name of the Tuscarora reservation or Seneca grant, containing nineteen hundred and twenty acres, be the same more, or less, being the lands in their occupancy, and not included in the land conveyed to them by Henry Dearborn, together with all and singular the rights, the rights, privileges, heraditaments, and appurtenances to the said tract or parcel of land belonging, or appertaining, and all the estate, right, title, interest, claim and demand of the said party of the first part, and of the said Tuscarora nation of Indians of, in and to the same, and to every part and parcel thereof: To have and to hold all and singular the above described and released premises unto the said Thomas Ludlow Ogden and Joseph Fellows, and their heirs and assigns, to their proper use and behoof for ever, as joint tenants and not as tenants in common.
In witness whereof, the parties to these presents have hereunto and to three other instruments of the same tenor and date, one to remain with the United States, one to remain with the State of Massachusetts, one to remain with the Tuscarora nation of Indians and one to remain with the said Thomas Ludlow Ogden and Joseph Fellows, interchangeably set their hands and seals, the day and year first above written.

Nicholas Cusick,
William Chew,
William Mountpleasant,
John Fox,
James Cusick,
John Patterson,
Samuel Jacobs,
James Anthony,
Peter Elm,
Daniel Peter.

Sealed and delivered in presence of—

James Stryker.
R. H. Gillet.
Charles H. Allen.
J. F. Schermerhorn.
Nathaniel T. Strong, U. S. interpreter.
H. B. Potter.
Orlando Allen.
(To the Indian names are subjoined a mark and seal.)

At the abovementioned treaty, held in my presence, as superintendent on the part of the Commonwealth of Massachusetts, and this day concluded, the foregoing instrument was agreed to by the contracting parties therein named, and was in my presence executed by them; and being approved by me, I do hereby certify and declare such my approbation thereof.
Witness my hand and seal, at Buffalo Creek, this 15th day of January, in the year 1838.

J. Trowbridge, Superintendent.

I have attended a treaty of the Tuscarora nation of Indians, held at Buffalo Creek, in the county of Erie in the State of New York, on the fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, when the within instrument was duly executed in my presence, by the sachems, chiefs, and warriors of the said nation, being fairly and properly understood and transacted by all the parties of Indians concerned and declared to be done to their full satisfaction. I do therefore certify and approve the same.

R. H. Gillet, Commissioner.
Feb. 13, 1838.

7 Stat., 561.

Supplemented article to the treaty concluded at Buffalo Creek, in the State of New York, on the 15th of January 1838, concluded between Ransom H. Gillet, commissioner on the part of the United States, and chiefs and head men of the St. Regis Indians, concluded on the 13th day of February 1838.

Supplemental article to the treaty concluded at Buffalo Creek in the State of New York, dated January 15 1838.

The undersigned chiefs and head men of the St. Regis Indians residing in the State of New York having heard a copy of said treaty read by Ransom H. Gillet, the commissioner who concluded that treaty on that part of the United States, and he having fully and publicly explained the same, and believing the provisions of the said treaty to be very liberal on the part of the United States and calculated to be highly beneficial to the New York Indians, including the St. Regis, who are embraced in its provisions do hereby assent to every part of the said treaty and approve the same. And it is further agreed, that any of the St. Regis Indians who wish to do so, shall be at liberty to remove to the said country at any time hereafter within the time specified in this treaty, but under it the Government shall not compel them to remove. The United States will, within one year after the ratification of this treaty, pay over to the American party of said Indians one thousand dollars, part of the sum of five thousand dollars mentioned in the special provisions for the St. Regis Indians, any thing in the article contained to the contrary notwithstanding.
Done at the council house at St. Regis, this thirteenth day of February in the year of our Lord one thousand eight hundred and thirty-eight. Witness our hands and seals.

R. H. Gillet, Commissioner.

Lover-taie-enve,
Louis-taio-rorio-te,
Michael Gaveault,
Lose-sori-sosane,
Louis-tioonsate,
Jok-ta-nen-shi-sa,
Ermoise-gana-saien-to,
Tomos-tataste,
Tier-te-gonotas-en,
Tier-sokoia-ni-saks,
Sa-satis-otsi-tsia-ta-gen,
Tier-sgane-kor-hapse-e,
Ennios-anas-ota-ka,
Louis-te-ganota-to-ro,
Wise-atia-taronne,
Tomas-outa-gosa,
Sose-te-gaomsshke,
Louis-orisake-wha,
Sosatis-atis-tsiaks,
Tier-anasaken-rat,
Louis-tar-oria-keshon,
Jasen-karato-on.

The foregoing was executed in our presence—
A. K. Williams, Agent on the part of New York for St. Regis Indians.
W. L. Gray, Interpreter.
Owen C. Donnelly.
Say Saree.
(To the Indian names are subjoined a mark and seal.)

We the undersigned chiefs of the Seneca tribe of New York Indians, residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, and to our contract therewith, the same having been submitted to us by Ransom

H. Gillet, a Commissioner on the part of the United States, and fully and fairly explained by him, to our said tribe, in council assembled.

Dated Buffalo Creek September 28 1838.

Captain Pollard,
Captain Strong,
White Seneca,
Blue Eyes,
George Bennett,
Job Pierce,
Tommy Jimmy,
William Johnson,
Reuben Pierce,
Morris Halftown,
Levi Halftown,
George Big Deer,
Jim Jonas,
George Jimeson,
Thomas Jimeson,
George Fox,
N. T. Strong,
Thompson S. Harris,
Samuel Gordon,
Jacob Jimeson,
John Gordon,
Tall Peter,
Billy Shanks,
James Stevenson,
Walter Thompson,
John Bennett,
John Seneca,
John General,
Major Jack Berry,
John Tall Chief,

Jabez Stevenson.
(To the Indian names are subjoined marks.)

The above signatures were freely and voluntarily given after the treaty and amendments had been fully and fairly explained in open council.

R. H. Gillet, Commissioner.

Witness:
H. A. S. Dearborn, Superintendent of Massachusetts.
James Stryker, U. S. Agent.
Little Johnson,
Samuel Wilson,
John Buck,
William Cass,
Long John,
Sky Carrier,
Charles Greybeard,
John Hutchinson,
Charles F. Pierce,
John Snow.
(To the Indian names are subjoined marks.)

These ten chiefs signed in my presence except the last John Snow.

H. A. S. Dearborn,
Superintendent of Massachusetts.

Signed in presence of—
Nathl. T. Strong, U. S. Interpreter.
James Stryker, U. S. Agent.
George Kenququide, by his attorneys.
N. T. Strong.
White Seneca.

The signature of George Kenququide was added by his attorneys in our presence.

R. H. Gillet,
James Stryker.

18th January 1839.
We the undersigned chiefs of the Oneida tribe of New York Indians do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States and fully and fairly explained by him to our said tribe in council assembled.
Dated August 9th 1838 at the Oneida Council House.

Executed in the presence of—
Timothy Jenkins.

First Christian Party:
Baptista Powlis,
Anthony Big Knife,
Peter Williams,
Jacob Powlis,
Anthony Anthony,
Peter Martin,
Cornelius Summer,
Isaac Wheelock,
Thomas Doxtater,
William Hill,
Baptiste Denny.
Orchard Party:
Jonathan Jordon,

Thomas Scanado,
Henry Jordon,
William Day.
Second Christian Party:
Abraham Denny,
Adam Thompson,
Peter Elm,
Lewis Denny,
Martin Denny.
(To the Indian names are subjoined marks.)

The above assent was voluntarily freely and fairly given in my presence, after being fully and fairly explained by me.

R. H. Gillet, Commissioner, &c.

We the undersigned sachems chiefs and head men of the Tuscarora nation of Indians residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, and to our contract connected therewith, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled.
Dated August 14th, 1838.

Nicholas Cusick,
William Chew,
William Mountpleasant,
John Patterson,
Matthew Jack,
George L. Printup,
James Cusick,
Jonathan Printup,
Mark Jack,

Samuel Jacobs.

Executed in presence of—
J. S. Buckingham,
D. Judson,
Leceister S. Buckingham,
Orlando Allen.
(To the Indian names are subjoined marks.)

The above assent was freely and voluntarily given after being fully and fairly explained by me.

R. H. Gillet, Commissioner.

We the undersigned chiefs and head men of the tribe of Cayuga Indians residing in the State of New York do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled.
Dated August 30th 1838.

Thomas Crow,
John Crow,
Ghastly Darkness,
Jacob G. Seneca.

Executed in presence of—
James Young.
(To the Indian names are subjoined marks.)

The above four signatures were freely given in our presence.

R. H. Gillet, Commissioner.
H. A. S. Dearborn,
Superintendent of Massachusetts.

We the undersigned sachems, chiefs and head men of the American party of the St. Regis Indians residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet a commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled. The St. Regis Indians shall not be compelled to remove under the treaty or amendments.
Dated October 9th, 1838.

Lorenn-taie-enne,
Sase-sori-hogane,
Louis-taw-roniate,
Thomas-talsete,
Saro-sako-ha-gi-tha,
Louis-te-ka-nota-tiron,
Michael Gareault,
W. L. Gray, Int.
Louis-tio-on-sate,
Tier-ana-sa-ker-rat,
Tomas-ska-en-to-gane,
Tier-sa-ko-eni-saks,
Saro-tsio-her-is-en,
Sak-tho-te-ras-en,
Saro-saion-gese,
Louis-onia-rak-ete,
Louis-aion-gahes,
Sak-tha-nen-ris-hon,
Sa-ga-tis-ania-ta-ri-co,
Louis-sa-ka-na-tie,
Sa-ga-tis-asi-kgar-a-tha,

Simon-sa-he-rese,
Resis-tsis-kako,
Ennias-kar-igiio,
Sak-tsior-ak-gisen,
Tier-kaien-take-ron,
Kor-ari-hata-ko,
Tomas-te-gaki-gasen,
Saro-thar-on-ka-tha,
Ennias-anas-ota-ko,
Wishe-te-ka-nia-tasoken,
Tomas-tio-nata-kgente,
wishe-aten-en-rahes,
Tomas-ioha-hiio,
Ennias-kana-gaien-ton,
Louis-taro-nia-ke-thon,
Louis-ari-ga-ke-wha,
Sak-tsio-ri-te-ha,
Louis-te-ga-ti-rhon,
Tier-atsi-non-gis-aks.

The foregoing assent was signed in our presence.

R. H. Gillet, Commissioner.

Witnesses:
James B. Spencer.
Heman W. Tucker.
A. K. Williams, Agent St. Regis Indians.
Frs. Marcoux Dictre.
(To the Indian names are subjoined marks.)

We the undersigned, chiefs, head men and warriors of the Onondaga tribe of Indians residing on the Seneca reservations in the State of New-York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the Senate of the United States on the eleventh day of

June, 1838, the same having been submitted to us, by Ransom H. Gillet, a commissioner on the part of the United States and fully and fairly explained by him to our said tribe in council assembled.
Dated August 31st, 1838.

Silversmith,
Noah Silversmith,
William Jacket.

(To the Indian names are subjoined marks.)

The above signatures were freely given in our presence.

R. H. Gillet, Commissioner.
H. A. S. Dearborn,
Superintendent of Massachusetts.

18 U.S.C. § 1151

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 53--INDIANS
§ 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights- of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

UNITED STATES CODE ANNOTATED
TITLE 25. INDIANS
CHAPTER 5--PROTECTION OF INDIANS
§ 177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

UNITED STATES CODE ANNOTATED
TITLE 25. INDIANS
CHAPTER 6--GOVERNMENT OF INDIAN COUNTRY AND RESERVATIONS
SUBCHAPTER I--GENERALLY
§ 233. Jurisdiction of New York State courts in civil actions

The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: Provided, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: Provided further, That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: Provided further, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes,

to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: And provided further, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: Provided further, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.

UNITED STATES CODE ANNOTATED
TITLE 25. INDIANS
CHAPTER 14--MISCELLANEOUS
SUBCHAPTER V--PROTECTION OF INDIANS AND CONSERVATION OF RESOURCES
§ 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for

which the land is acquired, and such lands or rights shall be exempt from State and local taxation.